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No. 88-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HERMAN SOIFER,

Petitioner,

—v.—

BANKERS TRUST COMPANY, *et al.*,

Respondents.

DANIEL RHOADES and MILTON BRATEN,

Petitioners,

—v.—

BANKERS TRUST COMPANY, *et al.*,

Respondents.

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1074—August Term 1987

Argued: April 28, 1988 Decided: October 3, 1988

Docket No. 88-7054

BANKERS TRUST COMPANY,

Plaintiff-Appellant,

—against—

DANIEL RHOADES, HERMAN SOIFER and MILTON BRATEN,

Defendants-Appellees.

Before:

CARDAMONE, PRATT, and MAHONEY,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, William C. Conner, *Judge*, dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), plaintiff's civil RICO complaint alleging that defendants, through common-law fraud, bankruptcy

fraud, perjury, and bribery, attempted to prevent plaintiff from collecting a debt owed to it by defendants' bankrupt corporation.

Reversed and remanded.

DAVID RABINOWITZ, New York, NY (David B. Picker, Moses & Singer, New York, NY, of Counsel), *for Plaintiff-Appellant*.

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PRATT, *Circuit Judge*:

This case is now on its second trip through the federal appellate system. On the first appeal, Bankers Trust Company ("Bankers") avoided dismissal when our split decision, holding that Bankers had failed to state a claim under 18 U.S.C. §§ 1964(c) and 1962 because it had not suffered "a distinct RICO injury" from defendants' alleged RICO violation, was vacated by the Supreme Court. *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *vacated*, 473 U.S. 922 (1985).

This time the issues are different, but they still focus upon whether Bankers can press its civil RICO action against these defendants. First, does Bankers lack standing to bring a civil RICO action against the officers of a bankrupt corporation for injuries sustained as a result of the officers' fraudulent depletion of corporate assets? Second, is Bankers' action barred by the statute of limitations?

The district court decided both questions against Bankers and dismissed the action pursuant to Fed. R. Civ. P. 12(b)(6). We disagree with the district court and hold that (1) Bankers has standing to bring a civil RICO action against these defendants, and (2) that Bankers' action, at least in part, is not barred by the statute of limitations, but (3) that the portion of Bankers' claim seeking to recover for its lost debt is premature and therefore must be dismissed without prejudice. Accordingly, we reverse and remand.

I. BACKGROUND

In reviewing this motion to dismiss under Fed. R. Civ. P. 12(b)(6), we must accept the allegations of plaintiff's complaint as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Cooper v. Pate*, 378 U.S. 546, 546 (1964).

Daniel Rhoades, Herman Soifer, and Milton Braten own, direct, and control Braten Apparel Corporation ("BAC"), a New York corporation grossing over $50 million per year through the import, manufacture, and sale of apparel. As with most businesses of this size, BAC has multiple creditors, the largest being Bankers—a banking company incorporated and headquartered in New York City—to which BAC currently owes over $4 million.

In August 1974, due to severe financial losses and in an effort to avoid BAC's liabilities to Bankers and other creditors, Braten and Soifer agreed to seek a reduction of the corporation's debts through a Chapter 11 bankruptcy proceeding. In so doing, they agreed to fraudulently conceal from BAC's creditors a major asset: Brookfield Clothes, Inc. ("Brookfield"), a recently acquired corporation specializing in the sale of apparel, with net assets in excess of $3 million.

To carry out this scheme, Braten and Soifer executed a sham document which they later claimed was a valid shareholders' agreement. The document required BAC or Braten to lend Brookfield $250,000 by a specified date, in default of which BAC's ownership of Brookfield would be transferred to Soifer. Soifer and Braten never intended that the loan be made, but expected that the bankruptcy court and BAC's creditors, upon being shown the sham document and being informed that the condition had not been met, would believe that BAC no longer had any ownership interest in Brookfield. Braten and Soifer agreed that Soifer would hold Brookfield in a secret trust during the pendency of BAC's Chapter 11 proceedings, and would return it only after BAC had achieved a substantial reduction in its debts through a confirmed reorganization plan.

After completing this fraudulent transfer, BAC filed a petition in bankruptcy on September 5, 1974. Rhoades acted as attorney for BAC and, along with Braten and Soifer, misrepresented to the court, to Bankers, and to other creditors that, because BAC had failed to issue the loan as required under the shareholders' agreement, it no longer had any ownership interest in Brookfield.

Relying on these misrepresentations, Bankers agreed to, and the bankrupty court confirmed, a plan of arrangement for BAC under which Bankers agreed to receive only 17.5% of its allowed claim. This plan relieved BAC of more than $4.3 million in debts, and permitted it to continue operating with Rhoades, Braten, and Soifer retaining control. Critical to Bankers' acceptance of the plan was its belief that *all* BAC assets were being made available to the Chapter 11 proceeding. Had it known of the fraudulent transfer of Brookfield, Bankers never would have consented to the reorganization plan.

Shortly after confirmation of the plan and termination of the bankruptcy proceedings, Soifer, through a complicated series of transactions, returned ownership and control of Brookfield to BAC. At that time, Brookfield anticipated sales of $18 million in the coming year, had an annual net income in excess of $1.4 million, and had assets valued at well over $10 million.

In a further attempt to delay Bankers from collecting its debt, Rhoades, Braten and Soifer initiated frivolous lawsuits against Bankers in both New York and South Carolina state courts. In connection with the South Carolina action, in late 1978 Rhoades acquired, through a South Carolina corporation which he formed and which Soifer and Braten owned, a mortgage on which the judge presiding over the South Carolina action was personally obligated. Through an illegal agreement with the South Carolina judge, defendants then paid the judge's debt as the mortgage installments came due. In return, the judge rendered two decisions favorable to BAC: on November 9, 1978, he denied Bankers' motion to dismiss the action; and on January 18, 1979, he appointed a special referee who had ties to BAC and its counsel. These two bribed

decisions caused Bankers to expend over $100,000 in legal fees.

In September 1976, upon learning of the transfer of Brookfield back to BAC, Bankers moved in the bankruptcy court to revoke BAC's confirmation plan, alleging that it had been procured by fraud. The record is unclear as to why the bankruptcy court did not act on this motion immediately; but whatever the reason, in 1981-82, over five years after Bankers moved to revoke but while that motion was still pending, Rhoades, Braten and Soifer, in a continuing attempt to prevent Bankers and other creditors from collecting their debts, conspired to and did in fact fraudulently conceal and deplete BAC assets through a wide variety of methods, including fraudulent stock transfers, transfers of corporate assets to other companies and individuals without fair consideration, and transfers of monies in corporate accounts to satisfy defendants' personal debts. Finally, on June 30, 1982, the bankruptcy court, holding that BAC had obtained its Chapter 11 reorganization by fraudulent means, revoked its confirmation plan and reinstated the bankruptcy proceedings. Those proceedings are still pending in the bankruptcy court.

Bankers commenced this action against defendants in the district court on August 24, 1982. It alleged that the continuing actions of Rhoades, Braten and Soifer—the common-law fraud and bankruptcy fraud in 1974-76, the frivolous lawsuits and bribery of the South Carolina judge in 1978-79, and the fraudulent conveyances in 1981-82—constituted a "pattern of racketeering activity" in violation of 18 U.S.C. § 1962(a)-(d).

In his first decision in 1983, Judge Conner found that plaintiff's complaint alleged a violation of 18 U.S.C. § 1962, and that "the injuries suffered by Bankers were a

direct consequence of the predicate acts." *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1242 (S.D.N.Y. 1983). Nevertheless, he dismissed the complaint because Bankers did not suffer a "competitive" injury. *Id.* at 1240-42. A divided panel of this court affirmed, *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1983), but the Supreme Court subsequently vacated the judgment, *see Bankers Trust Co. v. Rhoades*, 473 U.S. 922 (1985), in light of its decision in *Sedima v. Imrex Co.*, 473 U.S. 479 (1985).

On remand, the district court received further briefing on two issues raised in defendants' initial motion to dismiss but not addressed in the court's first decision: standing and statute of limitations. Thereafter, on September 3, 1986, the district court issued an order (1) upholding the complaint as to Rhoades and Braten; (2) dismissing the claims of substantive RICO violations against Soifer as time-barred; but (3) upholding the claim that Soifer conspired with the other defendants to violate RICO. On the standing issue, the district court specifically held that Bankers had asserted "injuries * * * in its own right", not merely injuries to BAC which might be recoverable only by a bankruptcy trustee. *Bankers Trust Co. v. Feldesman*, 648 F. Supp. 17 (S.D.N.Y. 1986).

Defendants moved to reargue, and on December 22, 1987, the district court reversed itself in part and dismissed Bankers' complaint as to all defendants. Specifically, the district court held that Bankers lacked standing to pursue a civil RICO action based on defendants' common-law fraud, perjury and bankruptcy fraud—all alleged to be part of defendants' attempt to deplete BAC assets—because Bankers had suffered no injury from these illegal acts. Rather, the court stated, only BAC, as the corpora-

tion whose assets were fraudulently transferred, was injured by defendants' actions. In addition, applying a three-year statute of limitations, the district court held the bribery claims time-barred because the last injury to Bankers occurred on January 18, 1979, over three years before it commenced its RICO action in federal court. *Bankers Trust Co. v. Feldesman*, 676 F. Supp. 496 (S.D.N.Y. 1987).

This appeal followed.

II. DISCUSSION

Bankers' argument on appeal is two-fold. First, it argues that it has standing to pursue a civil RICO claim directly against the individual defendants, and that the district court's holding to the contrary was error. Second, Bankers contends that the district court erred in dismissing on statute of limitations grounds. We agree with both contentions.

A. *Bankers' Standing to Bring a RICO Claim.*

Determining that formulation of an acceptable plan of reorganization "would be all but impossible if a creditor could employ RICO to recover misappropriated assets from the bankrupt's corporate officers" during the pendency of the bankruptcy proceedings, the district court held that Bankers had no standing "to sue for any injury attributable to the depletion of BAC's corporate assets." Such analysis correctly perceives a legitimate problem—if Bankers is allowed to bring its RICO claim (and collect treble damages plus costs and attorney's fees), there may well be nothing left for the bankrupt's estate to recover—

but it uses the wrong mechanism to ensure that problem's solution.

The civil RICO statute, 18 U.S.C. § 1964(c) provides that "*[a]ny person* injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor * * * and shall recover threefold the damages he sustains * * *." (emphasis added). This language contains no special limitation on standing; all that is required is that plaintiff suffer injury in fact, *see Sedima v. Imrex Co.*, 473 U.S. 479, 495 (1985) (the only standing requirement under § 1964(c) is that the plaintiff be "injured in his business or property by the conduct constituting the violation"), and that the injury be caused by defendants' RICO violation. Thus, as another panel of this court recently recognized: "A defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, but only to anyone whose injuries were caused by reason of a violation of section 1962." *Sperber v. Boesky*, 849 F.2d 60, 64 (2d Cir. 1988) (citation omitted). Significantly, this injury is not limited to damages suffered from the RICO violation as a whole, but also includes injuries suffered from each predicate act. Those acts are, when committed in the circumstances delineated in § 1962, "an activity which RICO was designed to deter", and recoverable damages "will flow from the commission of the[se] predicate acts." *Sedima*, 473 U.S. at 496.

With these principles in mind, along with congress's instructions that we broadly construe the statute, *see* Pub. L. 91-452, Title IX, Section 904, 84 Stat. 941, we hold that the district court erred when it applied an additional, special requirement of standing to Bankers' civil RICO claim. Put simply, if Bankers was injured by defendants' acts, as

its complaint adequately alleges in this case, *see* 741 F.2d at 515-16, it has standing to bring a RICO claim, regardless of the fact that a bankrupt BAC might also have suffered an identical injury for which it has a similar right of recovery.

This conclusion is not contrary to our decision in *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986), where we held that the shareholder of an injured corporation did not have individual standing to bring a claim under civil RICO. In so holding, we merely recognized a standing requirement applicable throughout corporate law: "An 'action to redress injuries to a corporation cannot be maintained by a shareholder in his own name but must be brought in the name of the corporation' " through a derivative action. *Id.* at 849 (*quoting Warren v. Manufacturers National Bank*, 759 F.2d 542, 544 (6th Cir. 1985)).

In this case, Bankers does not seek recovery for injuries suffered by BAC, but for injuries it suffered directly. Defendants' conduct—bribery, perjury, fraud, and bankruptcy fraud—caused Bankers monetary damage, and the right to recover for that injury belongs, not to BAC or its bankrupt estate, but to Bankers. *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2d Cir.), *cert. denied*, 479 U.S. 950 (1986) (where plaintiff corporation alleged that it suffered damages from the fraud of a director of a bankrupt corporation, plaintiff has a right to recover separate from any claim the bankrupt corporation may have).

It is true, as defendants argue and the district court recognized, that there is an overlap of RICO and bankruptcy law in this case. *Bankers Trust Co. v. Feldesman*, 676 F. Supp. 496, 503 (S.D.N.Y. 1987) ("Equitable distribution, the fundamental principle of bankruptcy, would be all but

impossible if a creditor could employ RICO to recover misappropriated assets from the bankrupt's corporate officers during the pendency of a Chapter 11 reorganization."). Such an overlap occurs not only because Bankers was injured by the identical transactions that injured the bankrupt corporation, but also because to the extent that the corporation, through its trustee in bankruptcy, is able to recover for its injury, Bankers' injury will be correspondingly reduced.

This overlap, however, does not present a question of Bankers' standing to bring a civil RICO claim, but rather presents the question of which and how much in damages Bankers can recover under that RICO claim, an issue we discuss in depth later in this opinion. *See infra, Part B, subsection 2(b).* As far as standing is concerned, there is no doubt, taking Bankers' allegations as true, that defendants violated § 1962 and that Bankers suffered injury from that violation. This is all that is necessary in order to bring an action under § 1964(c). *Sedima*, 473 U.S. at 495.

B. *Statute of Limitations.*

To begin with, the district court erred in applying a three-year limitations period to this civil RICO action. Six months before the district court issued its decision, the Supreme Court, perceiving a need for uniformity and following the model of the Clayton Act, *see* 15 U.S.C. § 15b (Supp. 1988), decreed that a four-year period should apply to all civil RICO actions regardless of the predicate acts involved. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, ____ U.S. ____, 107 S. Ct. 2759, 2767 (1987).

Correcting this error does not end our inquiry as to whether the judgment of the district court must be reversed, however, because there is another, far more dif-

ficult part to the limitations problem: when did Bankers' civil RICO action accrue? Did it accrue when defendants depleted BAC assets in 1972-74? When Bankers learned of those depletions in 1976? Or in 1978-79 when defendants again attempted to prohibit Bankers from collecting its rightful debt? Or in 1981-82 when defendants took further steps to deplete corporate assets? Or perhaps the action is yet to accrue as Bankers suffers new injuries from defendants' past or future RICO violations growing out of the same pattern of racketeering?

1. *Accrual of a civil RICO action.*

Because the earliest date the cause of action could have accrued in *Malley-Duff* was well within the four-year period adopted by the Court, the Supreme Court expressly left undecided the question of when a civil RICO action accrues. *Malley-Duff*, ____ U.S. at ____, 107 S. Ct. at 2767. Over the past few years, our district courts have wrestled with this accrual issue, but have reached varied, sometimes conflicting, results. *See, e.g., Long Island Lighting Co. v. Imo Delaval, Inc.*, 668 F. Supp. 237, 239-40 (S.D.N.Y. 1987) (explicitly rejecting plaintiff's theory that a civil RICO action does not accrue until commission of the last predicate act upon which the claim is founded, court holds that a claim "accrues when the plaintiff knows or should know of the injury that is the basis for the action"); *Cantor v. Life Alert, Inc.*, 655 F. Supp. 673 (S.D.N.Y. 1987) ("statute of limitations begins to run after commission of the first overt act causing damage"); *State of New York v. O'Hara*, 652 F. Supp. 1049, 1056 (W.D.N.Y. 1987) (civil RICO action for each injury accrues on the date each injury occurred); *Cahill v. Arthur Andersen & Co.*, 659 F. Supp. 1115, 1126 (S.D.N.Y. 1986) (action accrues at time of last alleged predicate act), *aff'd*

on other grounds, 822 F.2d 14 (2d Cir. 1987) (per curiam); *Bankers Trust Co. v. Feldesman*, 648 F. Supp. 17, 36 (S.D.N.Y. 1986) (applying the "continuing violation doctrine" to civil RICO claims). Recognizing this confusion, we today decide the question and hold that each time a plaintiff suffers an injury caused by a violation of 18 U.S.C. § 1962, a cause of action to recover damages based on that injury accrues to plaintiff at the time he discovered or should have discovered the injury.

We find support for this holding in two major sources. First and most important, the plain language of the statute requires it. Under § 1962, a person commits a RICO violation when he (a) invests income derived from a "pattern of racketeering" in an "enterprise"; or (b) controls an "enterprise" through a "pattern of racketeering activity"; or (c) participates in an "enterprise" through a "pattern of racketeering activity"; or (d) conspires to violate subsection (a), (b) or (c). 18 U.S.C. § 1962(a)-(d) (1984). In other words, a violation of § 1962 occurs when a person, through a "pattern of racketeering activity", acts to invest in, participate in, or control an "enterprise". Criminal liability for any of these violations is subject to a five-year statute of limitations which runs—where a substantive violation is alleged pursuant to subsection (a), (b) or (c)—from the time of the last predicate act of racketeering activity by the defendant, or—where a conspiracy violation is alleged pursuant to subsection (d)—from the time the objectives of the conspiracy have been accomplished or abandoned. *United States v. Persico*, 832 F.2d 705, 713-14 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1996 (1988).

An action to recover civil damages for these same criminal violations, while closely related, is nevertheless subject to an additional requirement. Section 1964(c) provides

that only a "person injured in his business or property by reason of a violation of section 1962" may bring a civil RICO action. Thus, a civil plaintiff must prove not only that the acts of defendant constitute a RICO violation, but also that plaintiff suffered injury as a result of that violation. *See Sperber v. Boesky*, 849 F.2d 60, 64 (2d Cir. 1988) (defendant liable only for injury "caused by reason of a violation of section 1962"); *Haroco, Inc. v. American National Bank and Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam). Until such injury occurs, there is no right to sue for damages under § 1964(c), and until there is a right to sue under § 1964(c), a civil RICO action cannot be held to have accrued. *See Sedima v. Imrex Co.*, 473 U.S. at 496 (plaintiff "can only recover to the extent that * * * he has been *injured* in his business or property by the conduct constituting the violation") (emphasis added).

Even after injury has occured, however, and a civil RICO claim has accrued, there will frequently be additional, independent injuries that will result from the same violation of § 1962, but which, because they will not occur until some point in the future, are not yet actionable as injuries to plaintiff's business or property. 18 U.S.C. § 1964(c) (1984). Multiple injuries, spread over time, frequently result from the very nature of a RICO violation. As we have recognized before, congress enacted RICO to deal with a broadly based, deeply rooted problem by establishing new prohibitions, enhanced sanctions, and new remedies to deal with the activities of those engaged in illegal practices. *Durante Bros. & Sons, Inc. v. Flushing National Bank*, 755 F.2d 239, 248 (2d Cir.), *cert. denied*, 473 U.S. 906 (1985) (citing Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (Statement of Findings and Purpose)). Rather than simply providing a

new avenue of redress for wrongs cognizable at common law or prohibited by statute, congress's main goal was to eradicate organized crime. *Cullen v. Margiotta*, 811 F.2d 698, 718 (2d Cir.), *cert. denied*, 107 S. Ct. 3266 (1987). To reach this goal, RICO takes a unique approach: it looks for a "pattern" of illegal acts—each of which, standing alone, may injure a plaintiff—and then views them together as a single violation. As a result, there may be encompassed within a single RICO violation injuries, both multiple and independent, that occur over a broad span of time. *See generally Sedima*, 473 U.S. at 496 & n.14.

With these multiple injuries in mind, congress tied the right to sue for damages under § 1964(c), not to the time of the defendant's RICO violation, but to the time when plaintiff suffers injury to "his business or property" from the violation. Consequently, a plaintiff's action accrues against a defendant for a specific injury on the date that plaintiff discovers or should have discovered that injury. *See Cullen v. Margiotta*, 811 F.2d 698, 725 (2d Cir.) ("[u]nder federal principles, a claim accrues when the plaintiff 'knows or has reason to know' of the injury that is the basis of the action") (citation omitted), *cert. denied*, 107 S. Ct. 3266 (1987). At a later date, when a new and independent injury is incurred from the same violation, the plaintiff is again "injured in his business or property" and his right to sue for damages from that injury accrues at the time he discovered or should have discovered that injury. The logical end result is that a plaintiff may sue for any injury he discovers or should have discovered within four years of the commencement of his suit, regardless when the RICO violation causing such injury occurred. *See State Farm Mutual Automobile Insurance Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) ("as to each injury civil RICO limitations period 'begins to run when the

plaintiff knows or has reason to know of the injury which is the basis of the action' ") (citation omitted).

We hasten to add that although a cause of action for a new and independent injury does not accrue until the plaintiff actually suffers that injury, this does not mean that a plaintiff can never recover future damages on a civil RICO claim. On the contrary, where the plaintiff has already suffered injury and will continue to suffer that *same* injury in the future, an award of past and future damages may be entirely appropriate, subject of course to the normal standards governing such awards. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 295 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Only in instances where the plaintiff has suffered no injury, or where the injury is unprovable, is an award of future damages inappropriate. *See* 18 U.S.C. § 1964(c) (1984); *Zenith*, 401 U.S. at 339.

As a second major source of support to the rule of separate accrual that we apply today, we look to the Clayton Act, 15 U.S.C. § 15 *et seq.* (Supp. 1988). In holding that the Clayton Act's four-year statute of limitations was "the most appropriate limitations period for [civil] RICO actions", the Supreme Court explicitly recognized that "the civil action provision of RICO was patterned after the Clayton Act." *Malley-Duff*, ____ U.S. at ____, 107 S. Ct. at 2764, 2767. Indeed, "[t]he 'clearest current' in the legislative history of RICO 'is the reliance on the Clayton Act model.' " *Id.* at ____, 107 S. Ct. at 2764 (*quoting Sedima*, 473 U.S. at 489). Noting the statutes' similarities, the Court found that both RICO and the Clayton Act "are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees";

that both statutes "bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate"; that "the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages"; and that both statutes "aim to compensate the same type of injury" by requiring "that a plaintiff show injury 'in his business or property by reason of' a violation". *Id.* at ____, 107 S. Ct. at 2764.

In light of these similarities, we have little trouble in concluding that the same statute which lends its four-year limitation period to civil RICO actions should also lend its rule of accrual in determining when the four-year period begins to run. Generally, a cause of action under the Clayton Act accrues and the statute of limitations begins to run, when a defendant commits an antitrust violation that injures a plaintiff's business. *Zenith*, 401 U.S. at 338; *Berkey Photo*, 603 F.2d at 295. An action for the injury must be brought within four years, plus any additional period during which the statute of limitations may be tolled. *Zenith*, 401 U.S. at 338.

In the context of a continuing antitrust violation with continuing injuries, this has usually been understood to mean that each time plaintiff suffers an injury caused by an illegal act of defendants, a cause of action accrues to plaintiff to recover damages based on that injury. *Zenith*, 401 U.S. at 338; *Crummer Co. v. Du Pont*, 223 F.2d 238, 247-48 (5th Cir.), *cert. denied*, 350 U.S. 848 (1955). "Each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial."

Zenith, 401 U.S. at 338-39. Thus, if a plaintiff discovers or should have discovered injury from an antitrust violation on a specific date, "a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future * * *." *Id.* To recover those damages, he must sue within four years of the time the action accrued.

Of course, future damages arising from defendants' conduct are "unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." *Id.*; *see also Berkey Photo*, 603 F.2d at 295; *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872, 884 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972). In such cases, "refusal to award future damages as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. The cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted." *Zenith*, 401 U.S. at 339. These Clayton Act principles of accrual apply equally to civil RICO actions.

We realize that in adopting a "rule of separate accrual" *State Farm*, 828 F.2d at 5 (Kennedy, C.J., concurring), we are rejecting the general federal rule of accrual, which requires in cases involving continuing violation and continuous injury that the statute of limitations begin running upon the commission of the first overt act causing damage, and does not permit a subsequent injury to start the limitations period running anew. *See Lowell Wiper Supply Co. v. Helen Shop, Inc.*, 235 F. Supp. 640, 644 (S.D.N.Y. 1964) (collecting cases). Such a rejection is mandated by the continuing violations and injuries sought to be reme-

died under RICO and the Clayton Act. "Otherwise, future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery, contrary to the congressional purpose that private actions serve 'as a bulwark of * * * enforcement,' and that the * * * laws fully 'protect the victims of the forbidden practices as well as the public.' " *Zenith*, 401 U.S. at 340 (citations omitted).

In sum, we today hold that civil RICO actions are subject to a rule of separate accrual. Under this rule, each time plaintiff discovers or should have discovered an injury caused by defendant's violation of § 1962, a new cause of action arises as to that injury, regardless of when the actual violation occurred. A plaintiff, under *Malley-Duff*, must then bring his action within four years of this accrual to recover damages for the specific injury. Naturally, as with all rules of accrual, the standard tolling exceptions apply. *See, e.g., Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) (class action tolling); *State of New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1084 (2d Cir. 1988) (fraudulent concealment); *Cullen v. Margiotta*, 811 F.2d 698, 721-24 (2d Cir.), *cert. denied*, 107 S. Ct. 3266 (1987) (class action and duress).

2. *Application to this case of the statute of limitations under the rule of separate accrual.*

Having determined generally that plaintiff may recover for any injury caused by defendants' RICO violation if plaintiff discovered or should have discovered that injury within four years of the commencement of this action, we now apply this standard to Bankers' specific injury claims.

Bankers commenced its action on August 24, 1982; hence, it may recover for any injury it discovered or

should have discovered on or after August 24, 1978. In its third amended complaint, Bankers alleges multiple injuries which may be grouped into three general categories: (a) past legal fees and other expenses, (b) loss of a legitimate debt and related expenses, and (c) future legal fees and expenses. We shall discuss each in turn.

a. *Past legal fees and other expenses.* Several injuries claimed by Bankers fall within this category: (1) an unspecified amount in legal fees and other expenses incurred in fighting defendants' frivolous lawsuits in New York state court; (2) $100,000 in legal fees and other expenses spent in overcoming bribe-induced decisions in a similar lawsuit in South Carolina; and (3) $100,000 in legal fees and other expenses incurred in obtaining a revocation of the initial reorganization plan.

Under our rule of separate accrual, Bankers may recover any of these expenses which it discovered or should have discovered on or after August 24, 1978. We therefore instruct the district court that it may dismiss from this action any claim for legal fees and other expenses which Bankers discovered or should have discovered before that date. In so instructing, we note our agreement with Judge Conner when he held that Bankers suffered injury as to each expense when it became obligated to pay that expense, and not at some later date when it actually made the payment. *Bankers Trust Co. v. Feldesman*, 676 F. Supp. 496, 504 (S.D.N.Y. 1987) ("If Bankers was able to postpone accrual of its claim until it had paid its legal expenses, then Bankers could keep its claim open indefinitely simply by protracting the litigation.").

b. *Loss of a legitimate debt and related expenses.* In this second category, Bankers claims (1) loss of a legiti-

mate debt in 1976 when, relying on defendants' misrepresentations, it accepted a bankruptcy reorganization plan that would have allowed Bankers to recover only 17.5% of its allowed claim; (2) loss of the use of those funds from that time to present; and (3) an additional loss in funds which might have been used to pay the debt in 1981-82, but were instead fraudulently transferred by the defendants.

Normally of course, we would simply instruct the district court to determine what portion of these injuries Bankers discovered or should have discovered after August 24, 1978, and order that Bankers could not recover on any injury which it discovered or should have discovered before that date. However, in this case, we hold that Bankers' damages in this category are "unrecoverable", at least at this time, because "their accrual is speculative" and "their amount and nature unprovable". *Zenith*, 401 U.S. 339; *Berkey Photo*, 603 F.2d at 295.

As discussed previously, Bankers' RICO claim for injuries suffered as a result of its lost debt overlaps with the ongoing proceedings in the bankruptcy court. This is because (1) Bankers was injured by the identical transactions that injured the bankrupt corporation, and (2) should the corporation, through its trustee in bankruptcy, recover for its injury, Bankers' injury will itself be reduced. For instance, should the bankruptcy trustee ultimately recover all the fraudulently transferred assets, Bankers' injury could be significantly reduced; conversely should the assets never be recovered, or should the bankruptcy court order the claim abandoned, Bankers' injury would be much more severe.

Trebling and attorney's fees aside, congress intended the basic award under civil RICO to compensate the plaintiff for injury to "his property or business." 18 U.S.C.

§ 1964(c) (1984). As in other areas of the law, this compensation takes the form of awarding damages sufficient to place the plaintiff in the same financial position he would have occupied absent the illegal conduct. *Illinois C.R. Co. v. Crail*, 281 U.S. 57 (1930); *United States Steel Products Co. v. Adams*, 275 U.S. 388 (1928).

Yet, at this time, it is impossible to determine the amount of damages that would be necessary to make plaintiff whole, because it is not known whether some or all of the fraudulently transferred funds will be recovered by the corporation. Should they be recovered, Bankers would benefit along with BAC's other creditors and its injury would decrease. As a result, the damages in this area are "speculative" and "unprovable", *Zenith*, 401 U.S. at 399; any claim for relief based on the lost-debt injury must therefore be dismissed without prejudice.

As we stated previously, refusal to award damages as too speculative is equivalent to holding that no cause of action has yet accrued. *Zenith*, 401 U.S. at 339. When the damages do become definite, a claim will accrue, and plaintiff will have four years to bring an action for recovery. *Id.* Consequently, after the claims that Bankers has in common with BAC are dealt with by the bankruptcy court—through recovery of all or part of BAC's assets, an order of abandonment, or some other final disposition of the lost-debt claims—Bankers' injury will be ascertainable, an action as to the injury will accrue, and Bankers will then have four years to bring a civil RICO action to recover the damages it has suffered in this area, subject of course to the normal rules and procedures governing such claims.

c. *Future injury.* Bankers' complaint also alleges that it will continue to suffer future injury as it spends addi-

tional funds to trace lost assets and incurs ongoing legal fees and other expenses in the bankruptcy proceeding. As to these future expenses, however, Bankers has not yet suffered injury, and its claim therefor is yet to accrue. The trial court may, of course, permit supplementation of the complaint to allow for damages of this type suffered up to the time of trial. *Borger v. Yamaha International Corp.*, 625 F.2d 390, 398 (2d Cir. 1980); *Shayne v. Madison Square Garden Corp.*, 491 F.2d 397, 401 (2d Cir. 1974). To recover future fees and expenses beyond that time, Bankers must wait until it suffers the injury.

In sum as to the statute of limitations issues, we reverse the district court and remand with the instruction that it reinstate Bankers' substantive and conspiracy claims against all defendants, but limit any recovery to damages for injuries which Bankers discovered or should have discovered on or after August 24, 1978. In addition, the district court shall dismiss any claim by Bankers to recover damages based on its unrecovered debt without prejudice to refiling after the bankruptcy court has finally disposed of the corporation's claim based on the same underlying transactions.

C. *Other Arguments.*

Three other arguments merit brief mention here. First, Bankers argues that because BAC is still controlled by defendants—Bankers should be allowed to bring its RICO claims to recover for its lost debt in spite of the ongoing bankruptcy proceedings. That this argument carries some weight cannot be contested—after all, it is unlikely that Rhoades, Soifer and Braten would initiate an action for breach of fiduciary duty against themselves—but Bankers presents this argument in the wrong forum. It is the bank-

ruptcy court, in the first instance, that has power to appoint a trustee, to order the claim abandoned by the trustee so that Bankers may proceed, or to grant some other relief from the automatic stay. Any argument and decision on this point should thus take place, in the first instance, in the bankruptcy court.

Second, Bankers contends that at most, its claims, which were dismissed by the district court, should only have been stayed. *See* 11 U.S.C. § 362(a)(3) (Supp. 1988). We need not reach this argument, however, because, as discussed above, Bankers' claims that arise after the beginning of the four-year limitations period fall into two groups: those that have accrued and those that have not. As to the former, the claims are reinstated. As to those that have not yet accrued, there is no action yet pending and therefore nothing to be stayed.

Finally, we reject Soifer's contention that the complaint does not sufficiently allege his participation in the 1978-79 or 1981-82 acts of the other defendants. At this early stage and in the absence of any meaningful discovery, Bankers has been unable to ascertain fully the extent of Soifer's participation in and knowledge of the bribery and 1982 frauds. Nevertheless, more than enough has been pled to raise an inference of Soifer's knowledge and participation.

The South Carolina corporation that Rhoades formed to assume the bribed judge's mortgage debt was beneficially co-owned by Soifer, and the moneys used to pay the bribe came from this corporation and from BAC (of which Soifer was not only a co-owner, but also an officer). BAC's assets were deliberately stripped away at a time when Soifer was its president, with some of these assets being transferred to other entities co-owned by Soifer, and over $4 million in cash being paid to or on behalf of Soifer

personally to enable a partnership of which he was a member to acquire real estate. In addition, at a time when revocation of BAC's bankruptcy reorganization was imminent, BAC's stock in Brookfield was transferred to another corporation beneficially co-owned by Soifer. These allegations are sufficient both under Fed. R. Civ. P. 12(b)(6) and 9(b). *See Bale v. Dean Witter Reynolds, Inc.*, 627 F. Supp. 650, 652 (D. Minn. 1986); *Kravetz v. Brukenfeld*, 591 F. Supp. 1383, 1388 n.9 (S.D.N.Y. 1984); *Green v. Hamilton International Corp.*, 437 F. Supp. 723, 729 (S.D.N.Y. 1977).

III. CONCLUSION

The judgment of the district court is reversed and the case is remanded.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 88-7054

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of November, one thousand nine hundred and eighty-eight.

BANKERS TRUST COMPANY,

Plaintiff-Appellant,

—v.—

DANIEL RHOADES, HERMAN SOIFER and MILTON BRATEN,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee HERMAN SOIFER.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 88-7054

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of October, one thousand nine hundred and eighty-eight

Present: Hon. Richard J. Cardamone,
Hon. George C. Pratt,
Hon. J. Daniel Mahoney,
Circuit Judges,

BANKERS TRUST COMPANY,

Plaintiff-Appellant,

—v.—

DANIEL RHOADES, HERMAN SOIFER and MILTON BRATEN,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York,

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is Reversed and the action be and it hereby is remanded to the district court for further proceedings consistent with the opinion of this court with costs to be taxed against the appellees.

ISSUED AS MANDATE: January 27, 1989

UNITED STATES DISTRICT COURT
S.D. NEW YORK

Dec. 22, 1987

No. 82 Civ. 5590 (WCC)

BANKERS TRUST COMPANY,

Plaintiff,

v.

Walter Feldesman, Daniel Rhoades, Herman Soifer, Milton Braten, Brookfield Clothes, Inc., Brookfield Industries, Inc., Bennington Court Ltd., Braxton Ltd., Aura By Laurie, Ltd., Erwin Commercial Corp., Michael B. Marks, Inc., Timely Textiles, Inc., Todd Equipment Leasing Co., Inc., and "John Does Nos. 1-50,"

Defendants.

OPINION AND ORDER

WILLIAM C. CONNER, District Judge.

This case is before the Court on defendants' motion pursuant to Rule 3(j) of the Local Civil Rules for an order granting reargument, and upon reargument, for dismissal of the complaint pursuant to Rules 9(b) and 12(b)(6), Fed.R.Civ.P. In the underlying motion defendants[1] moved for judgment on the pleadings under rule 12(c), Fed.R.Civ.P. Defendants advanced three arguments in support of the motion: (1) plaintiff Bankers Trust Co. ("Bankers Trust") did not adequately allege a pattern of racketeering activity, (2) Bankers lacks standing to assert a claim under the Racketeer Influenced and Corrupt Organiza-

1 Defendant Walter Feldesman was not a party to the motion, plaintiff having dismissed him from the case by stipulation dated March 4, 1983.

tions Act ("RICO"), and (3) Bankers' RICO claim was barred by the statute of limitations. On September 3, 1986 the Court ruled that plaintiff had adequately alleged the commission of a pattern of racketeering activity on the part of defendants Daniel Rhoades and Milton Braten, and the motion was denied as to them, 648 F.Supp. 17. The motion was granted as to the corporate defendants and they were dismissed from the case.[2] As to defendant Herman Soifer, the Court found a sufficient allegation of a pattern of racketeering activity, but dismissed the claim on the ground that it was barred by the statute of limitations. The Court did not dismiss the claim that Soifer conspired to violate RICO, finding that the action was timely in this regard. Plaintiff was granted leave to amend the complaint to plead a timely claim of racketeering activity against Soifer, and to plead a more specific RICO claim against the corporate defendants. Plaintiff repled with respect to Soifer, but did not replead with respect to the corporate defendants. For the reasons set forth below, defendants' motion is granted and the complaint is dismissed.

I. *Facts*

In deciding both the motion to dismiss under Rule 12(b)(6) and the reargument of the motion for judgment on the pleadings under Rule 12(c), the allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972) (Rule 12(b)(6)); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553 (2d Cir.1977) (Rule 12(c)). Bankers has alleged that the defendants engaged in various acts of bankruptcy fraud and bribery to prevent Bankers from recovering a debt owed by Braten Apparel Corporation ("BAC"), a corporation which the defendants controlled. BAC's debt to Bankers,

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2 Defendant Brookfield Clothes, Inc. ("Brookfield Clothes") did not join in the motion for judgment on the pleadings. Consequently, the complaint was not dismissed as to Brookfield Clothes. Walter Feldesman and the corporate defendants have all been previously dismissed from this case. Accordingly, collective references to defendants refer only to Daniel Rhoades, Herman Soifer and Milton Braten.

as of the date of this complaint, exceeds $4,000,000. At all relevant times BAC has been in the business of manufacturing, importing and selling goods in interstate commerce, resulting in net revenues in excess of $50,000,000 per year.

In August 1974, BAC owed substantial debts to Bankers and others, and had recently sustained severe losses. In an effort to avoid BAC's liability on its debts, Braten and Soifer, corporate officers of BAC, agreed to conceal BAC's recent acquisition of Brookfield Clothes, Inc. ("Brookfield Clothes") and to seek a discharge of its debts under Chapter XI of the Bankruptcy Reform Act of 1978.

To carry out this plan, Braten and Soifer executed a sham document hereinafter described as the shareholders' agreement. Pursuant to the shareholders' agreement BAC or Braten was required to furnish Brookfield Clothes with a $250,000 loan by a specified date, in default of which BAC's stock in Brookfield Clothes would be transferred to Soifer. Soifer and Braten, however, never intended that the $250,000 loan be furnished, and intended that BAC's creditors, upon being shown the shareholders' agreement and being told that the condition had not been met, would believe that BAC no longer had any interest in Brookfield Clothes. Braten and Soifer agreed that Soifer would hold Brookfield Clothes in a secret trust during the pendency of BAC's Chapter XI proceedings, and would return it to BAC after BAC had achieved the elimination or diminution of its debts through a confirmed plan of arrangement under Chapter XI. Braten and Rhoades also entered into a written agreement under which Rhoades, as attorney for Soifer, held stock in BAC to secure Braten's commitments to Soifer.

In furtherance of the scheme, Walter Feldesman, an attorney claiming to represent Soifer, misrepresented the validity of the shareholders' agreement to Bankers and to BAC's other creditors, and caused the transfer to Soifer of the Brookfield Clothes stock. Thereafter, on September 5, 1974, BAC filed a petition in Chapter XI before the United States District Court for the Southern District of New York, omitting BAC's ownership of the stock of Brookfield Clothes and omitting also the transfer of the stock to Soifer.

The defendants did not reveal the existence of the secret trust to Bankers, and between August 27, 1974 and March 9, 1976 they represented to Bankers and to the Bankruptcy Court that Braten did not furnish the $250,000 loan required by the shareholders' agreement. Consequently, Soifer appeared to own BAC's stock in Brookfield Clothes.

Bankers accepted a plan of arrangement in reliance on these omissions and misrepresentations, under which Bankers would receive only 17.5% of its allowed claim. Bankers' acceptance of the plan was necessary to obtain the assent of the majority of creditors, in terms of dollars owed, and therefore necessary to confirmation of the plan.

On March 12, 1976, the Bankruptcy Court issued an order confirming BAC's plan of arrangement. Consequently, BAC was relieved of more than $4.3 million in debts. At that time Brookfield Clothes had or anticipated sales of approximately $18 million per year, and net income in excess of $1.4 million per year. The stock of Brookfield Clothes was an asset of BAC worth more than $10 million. Had Bankers known that BAC owned Brookfield Clothes, Bankers would not have accepted the plan of arrangement. Likewise, if Bankers had discovered BAC's ownership of Brookfield Clothes between Bankers' acceptance of the plan and the court's confirmation order, then Bankers would have revoked its acceptance of the plan.

In August 1976 Soifer returned the Brookfield Clothes stock to BAC through a complicated series of transactions. Braten then transferred 45% of BAC's stock to Soifer in October 1976, in exchange for which Soifer gave Braten $25,000 in cash and a $450,000 note in July 1977. Braten then assigned the note to Rhoades.

Rhoades, acting on behalf of Soifer and together with Braten, commenced a series of lawsuits against Bankers in New York. These suits were intended to hinder and delay Bankers from collecting BAC's debt. In addition, in August 1977, BAC, by a South Carolina law firm to which Rhoades was counsel, instituted an action for damages against Bankers in South Carolina. This same firm was also representing BAC in a related South Carolina action in which BAC asserted claims to an escrow account in which Bankers had an interest. William

H. Ballenger was the presiding judge in both South Carolina actions.

In late 1978 and early 1979, Rhoades, through a South Carolina corporation which he formed and which Soifer and Braten owned, acquired or assumed a mortgage on which Judge Ballenger was personally obligated, and paid the Judge's debt as installments became due. Rhoades took these actions on behalf of himself, Braten and Soifer with the intention of thereby influencing the actions of Judge Ballenger in the litigation pending before him. As a result, Judge Ballenger rendered two decisions which were favorable to BAC: on January 18, 1979 Judge Ballenger appointed a special referee who was a former partner in the law firm representing BAC; and on November 9, 1978, Judge Ballenger denied Bankers' motion to dismiss the action for damages. These decisions caused Bankers to expend over $100,000 in legal fees.

In September 1976, Bankers commenced a proceeding to revoke BAC's confirmation of its Chapter XI arrangement as having been procured by fraud. This proceeding did not conclude until the bankruptcy court rendered its opinion on June 25, 1982, which held that defendants had procured the confirmation of BAC's plan of arrangement by fraud. During the pendency of that proceeding the defendants engaged in numerous acts which concealed and depleted the assets of BAC and Brookfield Clothes. On June 30, 1982, the bankruptcy court revoked the confirmation of BAC's plan of arrangement and reinstated the Chapter XI proceeding.

II. *Discussion*

On reargument defendants renew their contention that Bankers, as an individual creditor of BAC's estate in bankruptcy, lacks standing to assert a claim for damage under RICO. In support of the previous motion, defendants relied on *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843 (2d Cir.) *cert. denied*, ____ U.S. ____, 107 S.Ct. 579, 93 L.Ed.2d 582 (1986), and *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910), in which creditors and shareholders were barred from suing to

redress injuries to a corporation. In denying defendants' motion, the Court distinguished those cases. The Court noted that Bankers was not suing to redress injuries to BAC, but rather to redress injuries Bankers suffered in its own right. Indeed, as alleged in Bankers' original complaint, BAC suffered no injury since defendants' actions ultimately enhanced BAC's assets. In addition, the Court concluded that the alleged bribery of Judge Ballenger, which caused Bankers to expend more than $100,000 in legal fees, resulted in a distinct injury to Bankers apart from any injury to BAC and its other creditors.

In their present motion, defendants argue that even though Bankers is not suing derivatively, its claimed injury is no different from that of other creditors, and therefore its cause of action belongs to the estate. Defendants rely on *Dana Molded Products, Inc. v. Brodner*, 58 B.R. 576 (N.D.Ill. 1986).

The plaintiff in *Dana* was a judgment creditor of the American Wheel and Engineering Co. ("American Wheel"). The complaint alleged that during American Wheel's Chapter XI reorganization, the president of American Wheel transferred all the corporate assets without consideration to a new corporation of which his son was president. The judgment creditor then brought a RICO action alleging bankruptcy fraud as a predicate act. Defendant moved to dismiss arguing that plaintiff, as a creditor of the bankrupt corporation, suffered only indirect injury as compared to the direct injury of the corporation, and therefore lacked standing to sue under RICO. Plaintiff responded that it had standing because it was asserting a claim on its own behalf rather than a claim derived from the corporation. The court rejected this argument stating,

> the predicate acts of racketeering on which plaintiff bases its claim all involve fraudulent transfers of money from American Wheel, and the injuries plaintiff asserts are indistinguishable from those suffered by American Wheel itself. Indeed, it is only in its capacity as a creditor of American Wheel that plaintiff has been injured at all. . . . In short, plaintiff has suffered no 'separate' injury from that inflicted on the bankruptcy estate. . . .

58 B.R. at 579.

The instant case is distinguishable from *Dana* as well. In *Dana*, the predicate acts upon which the plaintiff relied *all* involved fraudulent transfers of the bankrupt corporation's assets. In the case at bar, however, Bankers alleges it was injured as a result of the bribery of Judge Ballenger. Bankers claims to have incurred legal fees in excess of $100,000 defending the actions before Judge Ballenger. These legal fees constitute an injury that is distinct from the injury to BAC and to the other creditors, and which do not involve fraudulent transfers of BAC's assets. Therefore, it is clear that Bankers has standing insofar as it was injured by the alleged bribery of Judge Ballenger.

Bankers' other RICO injuries, however, are predicated on acts of bankruptcy fraud. *Dana* would deny recovery for these injuries. Like the plaintiff in *Dana*, Bankers claims injury as the result of defendants' scheme to conceal and misappropriate corporate assets. In this Court's previous decision, the Court held that since defendants' misdeeds had enhanced BAC's assets, Bankers was not suing derivatively to redress injuries to BAC. Bankers' third amended complaint, however, no longer alleges acts that enhanced BAC's assets. Instead, it alleges numerous acts by which defendants depleted BAC's assets. *See* Third Amd. Comp't ¶¶ 42-52. Consequently, the issue for decision on defendants' motion to dismiss the third amended complaint is whether a creditor may bring a civil RICO action against the officers of a bankrupt corporation for injury sustained as a result of actions which depleted the corporation's assets. The determination of this issue requires the resolution of an apparent conflict between two statutory provisions—the Bankruptcy Reform Act and RICO.

When a debtor files a petition for relief under the Bankruptcy Reform Act, all entities are automatically stayed from "any act to obtain possession of property of the estate or of property from the estate." 11 U.S.C. § 362(a)(3). Under § 541 of the Bankruptcy Code the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). These two provisions have been interpreted to bar creditors from suing to enforce the corporation's right to misappropriated corporate

assets. *See Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2d Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 436, 93 L.Ed.2d 385 (1986); *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1273-75 (5th Cir. 1983). This furthers the fundamental bankruptcy policy of equitable distribution among creditors. *Id.* Without these provisions an equitable distribution would be impossible since whoever sued first would obtain payments of their claims in preference to and to the detriment of other creditors. *See* H.R.Rep. No. 595, 95th Cong., 1st Sess. 340, *reprinted in* U.S.Code Cong. & Ad.News 1978 pp. 5787, 5963, 6296-97.

RICO, on the other hand, provides that any person who has been injured in his business or property by a pattern of racketeering activity may recover treble damages. Congress intended that RICO would afford a private remedy for persons harmed by the criminal exploitation of the bankruptcy laws. *See Criminal Laws and Procedures: Hearing on § 2187, 2188, 2189, 2190 & 2578 Before Subcommittee on the Judiciary*, 89th Cong. 2d Sess. 204 (1966). Accordingly, RICO provides that acts of bankruptcy fraud can form the basis of a pattern of racketeering activity. Certainly, a creditor is injured in his business or property when, as alleged in this case, the officers of a bankrupt corporation conceal and misappropriate corporate assets through bankruptcy fraud and other racketeering activity. Thus, RICO apparently permits recovery in situations which would violate the automatic stay and frustrate the equitable distribution of the estate.

When two statutes appear to conflict, every attempt should be made to interpret them so that each is given effect. The Court can achieve this by applying common law standing principles to RICO. This was the approach of the court in *Dana*, 58 B.R. at 580, and in numerous other cases throughout the federal courts. *See, e.g., Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843 (2d Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 579, 93 L.Ed.2d 582 (1986); *Warren v. Manufacturers National Bank*, 759 F.2d 542 (6th Cir. 1985); *Carter v. Berger*, 777 F.2d 1173 (7th Cir.1985); *Nordberg v. Lord, Day & Lord*, 107 F.R.D. 692 (S.D.N.Y. 1985).

Dana relied on the Seventh Circuit's opinion in *Carter*. There, taxpayers whose assessments were raised as a result of bribes made to the assessor's office sued the bribers under RICO. Judge Easterbrook, writing for a unanimous panel, reviewed a broad spectrum of cases and found that as a general rule the indirectly injured party may not sue. 777 F.2d at 1175. The court concluded that this principle should apply in RICO cases as well. *Id.* The court in *Dana* agreed, and held that a corporation's creditors could not assert a RICO claim based on injuries inflicted directly against the corporation. 58 B.R. at 580.

Bankers argues that *Dana* is not controlling because its claims in the instant case are for a pattern of actions and injuries that are unique to it and unrelated to any bankruptcy matter. Plaintiff directs the Court to *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037 (2d Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 436, 93 L.Ed.2d 385 (1986), in which the Second Circuit held that a creditor's fraud claim against the officer of a bankrupt corporation is not property of the estate.

In *Cumberland*, as here, the plaintiff alleged injury arising out of a fraud in which the defendants misrepresented the corporation's finances and then stripped the debtor corporation of its assets. Although mindful of the bankruptcy policy of equitable distribution of assets, the court concluded that it was inapplicable in the case before it. 791 F.2d at 1042. The court distinguished an action for fraud, which is a direct action, from a shareholder's derivative action or an action under the New York fraudulent conveyance statute, in which a third party sues to enforce the rights of the corporation. *See id.* at 1041-43. As plaintiffs have argued in the instant case, RICO, like an action for fraud, is a direct action. Therefore, they assert that they have standing under *Cumberland* to state a claim based on the misappropriation of BAC's assets.

Cumberland, however, is distinguishable on its facts. In *Cumberland* every creditor who had filed a claim with the bankruptcy court received full payment on their claims prior to the plaintiff's suit. 791 F.2d at 1040. In addition, the bankruptcy trustee had already vindicated the corporation's right to recover misappropriated corporate assets by suing the corporate offi-

cers. *Id.* at 1042. Therefore, plaintiff's recovery did not threaten to disrupt the equitable distribution of the corporation's assets. Here, by contrast, the creditors have not received full payment on their claims, nor has BAC sued the corporate officers under a misappropriation theory. In fact, the bankruptcy court has revoked BAC's plan of arrangement, and has yet to authorize a new distribution. *Cumberland*, therefore, is not controlling.

This Court finds *Dana* persuasive. Equitable distribution, the fundamental principle of bankruptcy, would be all but impossible if a creditor could employ RICO to recover misappropriated assets from the bankrupt's corporate officers during the pendency of a Chapter XI reorganization. Therefore, Bankers does not have standing to sue for any injury attributable to the depletion of BAC's corporate assets.

Plaintiff argues that it is entitled to sue under RICO because BAC is under the continuing control of the defendants. Plaintiff points to *Carter*, in which the Seventh Circuit stated in *dictum* that the injured party may have standing to sue when the directly injured victim is under the continuing control of the defendant. 777 F.2d at 1176. Plaintiff correctly notes that this is the case here. The bankruptcy court has not appointed a trustee to manage BAC's affairs during the Chapter XI proceedings: BAC is a debtor in possession, and its daily affairs are still managed by its corporate officers—defendants Soifer, Braten and Rhoades. Nevertheless, BAC's reorganization is still pending before the bankruptcy court. Consequently, Bankers can move the bankruptcy court to appoint a trustee. This would enable the trustee to sue to recover the misappropriated assets on behalf of BAC and all of BAC's creditors, thereby ensuring an equitable distribution. If the trustee fails to bring such an action, then Bankers could treat the claim as abandoned and could bring an action on its own behalf without threatening the principles underlying the Bankruptcy Code. *See Mitchell Excavators, Inc. v. Mitchell*, 734 F.2d 129, 131 (2d Cir. 1984). As long as the bankruptcy case is open and Bankers is able to recover on its claim through the process of equitable distribution, however, a suit under RICO against BAC's corporate officers is inappropriate. Therefore, even though BAC is currently

under the control of the defendants there is no reason to allow Bankers to sue for the recovery of BAC's misappropriated assets.

Plaintiff argues that this result is contrary to Congress's intention that RICO provide a private remedy for persons harmed by the criminal exploitation of the bankruptcy laws. The result in this case, however, is consistent with Congress's intent. Bankers may still assert acts of bankruptcy fraud in support of its action under RICO, and Bankers has standing to assert a claim for those damages resulting from defendants' bribery of Judge Ballenger. Thus, Bankers may receive compensation for the harm it suffered as a direct result of defendants' bankruptcy fraud. Although the recovery is not as extensive as would be the case if Bankers were entitled to damages for the misappropriation of BAC's assets, this limitation is necessary to harmonize RICO with the Bankruptcy Code.

Defendants' motion for reargument also seeks reconsideration of the Court's ruling on the statute of limitations. In ruling on the original motion for judgment on the pleadings the Court held that a three-year statute of limitations would apply to civil RICO actions in New York. The Court also held that a RICO claim accrues for statute of limitations purposes when the plaintiff knows or has reason to know of the injury from the last predicate act on which he relies. The parties have not challenged these rulings on the motion for reargument. Applying these principles the Court concluded that the substantive RICO claim against Soifer accrued in September 1976, when Bankers discovered the first bankruptcy fraud and commenced a proceeding to set aside the confirmation of BAC's plan. Since Bankers waited until August of 1982 to commence this action, the three-year statute of limitations had long since expired. As to Braten and Rhoades, however, the original complaint alleged that they had taken actions to conceal BAC's assets within the limitations period. Thus the action was ruled timely as to them.

Under the third amended complaint, however, none of the substantive claims are timely as to any of the defendants. As stated above, the only acts of the defendants that give rise to an injury for which Bankers has standing to sue are those relating to the bribery of Judge Ballenger. This bribery resulted in two

decisions which caused Bankers injury. These decisions were rendered in November 1978 and January 1979. Bankers necessarily was aware of the injury caused by those rulings on or shortly after the date they were issued. Therefore, Judge Ballenger's January 1979 ruling is the last act on which Bankers may rely. Under the three-year statute of limitations, Bankers had to commence its RICO action to recover for these injuries by January 1982. Bankers, however, did not institute this action until August 1982. Consequently the substantive RICO claims are untimely as to all three defendants.

Bankers cannot claim that the payment of its own legal expenses at a later date constitutes a basis for postponing the accrual of its cause of action. A claim for damages accrues when the act causing the injury occurs, not when the injured party ceases to incur more damages. *See Korn v. Merrill*, 403 F.Supp. 377, 388 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 310 (2d Cir. 1976). If Bankers was able to postpone accrual of its claim until it had paid its legal expenses, then Bankers could keep its claim open indefinitely simply by protracting the litigation. This would be contrary to the purpose of the statute of limitations.

The Court found that a different accrual rule applies in the case of a continuing civil conspiracy. Under this rule, each time a member of the conspiracy commits an overt act in furtherance of the conspiracy, a cause of action accrues against all the persons who are then members of the conspiracy for the damages caused by that act. Membership in a conspiracy, once established, is presumed to continue until withdrawal is affirmatively shown. Therefore, since the original complaint alleged that within the limitations period Braten and Rhoades committed predicate acts which caused Bankers injury, and that those acts were committed in furtherance of a conspiracy of which Soifer was a part, Bankers' conspiracy claim was ruled timely even as to Soifer.

Under the third amended complaint, however, the acts that Braten and Rhoades allegedly committed during the limitations period did not cause Bankers to suffer a direct and distinct injury. It is well established that in a civil action for conspiracy the plaintiff may only recover for the injury caused by the specific acts—there is no recovery for the conspiracy itself. *Rutkin*

v. Reinfeld, 229 F.2d 248, 252 (2d Cir.), *cert. denied*, 352 U.S. 844, 77 S.Ct. 50, 1 L.Ed.2d 60 (1956); *Korry v. International Telephone & Telegraph Corp.*, 444 F.Supp. 193, 195 (S.D.N.Y. 1978). It is equally well established that a civil conspiracy claim accrues at the time of each injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971); *Rutkin*, 229 F.2d at 252; *Chodos v. Federal Bureau of Investigation*, 559 F.Supp. 69, 74 (S.D.N.Y.), *aff'd*, 697 F.2d 289 (2d Cir. 1982), *cert. denied*, 459 U.S. 1111, 103 S.Ct. 741, 74 L.Ed.2d 962 (1983). Under these principles, subsequent acts of a conspirator can support a new claim for injuries resulting from those acts, but they cannot postpone accrual of a claim seeking recovery for an earlier injury.

The Second Circuit explained the rationale underlying the accrual of civil conspiracy claims in *Rutkin v. Reinfeld*. There, the court ruled that a conspiracy claim brought under state law to recover for an injury in 1931 was untimely even though plaintiff claimed the conspiracy continued until commencement of the suit in 1948. Concluding that a claim for civil conspiracy accrues "as soon as the damage . . . is inflicted," the court reasoned that tolling the statute of limitations until termination of the conspiracy would "make a shambles of the statute of limitations and pervert its salutary purpose to set stale claims at rest." *Id.* at 252. In subsequent cases, the courts of this circuit have applied this accrual rule to civil conspiracy claims brought under the civil rights laws, *Singleton v. City of New York*, 632 F.2d 185, 192 (2d Cir. 1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981), to civil conspiracy claims brought under the antitrust laws, *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 193 F.Supp. 401 (S.D.N.Y. 1961), and to civil conspiracy claims brought under the False Claims Act. *Blusal Meats, Inc. v. United States*, 638 F.Supp. 824 (S.D.N.Y.1986), *aff'd*, 817 F.2d 1007 (2d Cir.1987).

In *Compton v. Ide*, 732 F.2d 1429 (9th Cir.1984), the Ninth Circuit applied the same accrual rule to a civil conspiracy claim brought under RICO. The court reasoned that the statutory requirement that plaintiff suffer injury in its business or property suggests that the normal federal rule on accrual should apply to civil RICO actions alleging conspiracy. *Id.* at 1433.

In deciding Bankers' motion for judgment on the pleadings, this Court followed *Compton* and applied the general rule for the accrual of civil conspiracies. On reargument, the Court has not been persuaded that this was erroneous. Under the third amended complaint, however, Bankers has not alleged any legally cognizable injury within the applicable limitations period. Although Bankers alleges that Braten and Rhoades acted to further the conspiracy within three years of Bankers' complaint, none of those acts caused Bankers to suffer a direct and distinct injury. Consequently, the conspiracy claims are untimely.

III. *Conclusion*

For the foregoing reasons, defendants' motion to reargue is granted, and upon reargument defendants' motion to dismiss pursuant to rule 12(b)(6), Fed.R.Civ.P., is granted.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 CIVIL 5590 (WCC)

BANKERS TRUST COMPANY,

Plaintiff,

—against—

WALTER FELDESMAN, DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, et al.,

Defendants.

JUDGMENT

Defendants Rhoades, Soifer and Braten having moved for an order granting reargument, and upon reargument, for dismissal of the complaint, and the said motion having come before the Honorable WILLIAM C. CONNER, U.S.D.J., and the Court thereafter on December 22, 1987, having handed down its opinion and order (#62947); granting defendants' motion and dismissing the complaint, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

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UNITED STATES DISTRICT COURT
S.D. NEW YORK

Sept. 3, 1986

As Amended Feb. 4, 1987

No. 82 Civ. 5590 (WCC)

BANKERS TRUST COMPANY,

Plaintiff,

—v.—

WALTER FELDESMAN, DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE, LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., and "JOHN DOES Nos. 1-50,"

Defendants.

WILLIAM C. CONNER, District Judge:

Plaintiff Bankers Trust Company ("Bankers") commenced this action in August 1982 seeking to invoke the civil remedies of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982 & Supp. II 1984), to recover treble damages and attorney's fees for injuries suffered as a consequence of defendants' alleged bankruptcy frauds. In the spring of 1983, virtually all defendants[1] moved pursuant to rule 12(c), Fed.R.Civ.P., for judgment on the pleadings, arguing that the complaint was insufficient to state a civil claim under RICO. Defendant Herman Soifer ("Soifer") also con-

1 Plaintiff had dismissed its claims against defendant Walter Feldesman by stipulation endorsed by the Court on March 4, 1983. Defendant Brookfield Clothes, Incorporated did not join in the motions of the other defendants.

tended that the claims against him were barred by the statute of limitations or, if not, that they could be asserted only in pending bankruptcy proceedings.

In an Opinion and Order dated June 29, 1983, I granted the moving defendants' motions for judgment on the pleadings. *Bankers Trust Co. v. Feldesman*, 566 F.Supp. 1235, 1242 (S.D.N.Y.1983), *aff'd sub nom. Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir.1984), vacated, ____ U.S. ____, 105 S.Ct. 3550, 87 L.Ed.2d 673 (1985). Although I concluded that a private plaintiff seeking to invoke the civil remedies of RICO need not allege that the defendants are members of, or have ties to, organized crime, *id.* at 1239-40, I held that the plaintiff must allege that he has suffered a distinct RICO injury as opposed merely to a direct injury from the underlying predicate acts, *id.* at 1240-42. Because I found that Bankers' injuries were the direct result of the underlying predicate acts, and not a consequence of any independent pattern of racketeering activity, *id.* at 1242, I granted the moving defendants' motions to dismiss without considering the additional grounds advanced in support of the motions, *id.* at 1242 & n. 10.

Bankers appealed to the Second Circuit, and in July 1984, that court affirmed my decision. *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir.1984), *vacated*, ____ U.S. ____, 105 S.Ct. 3550, 87 L.Ed.2d 673 (1985). In July 1985, the Supreme Court decided two unrelated RICO actions, *Sedima, S.P.R.L. v. Imrex Co.*, ____ U.S. ____, 105 S.Ct. 3275, 87 L.Ed.2d 349 (1985), and *American National Bank & Trust Co. v. Haroco, Inc.*, ____ U.S. ____, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985). The Supreme Court also summarily vacated the Second Circuit's decision in this case and remanded the action to the court of appeals "for further consideration in light of" the Supreme Court's other RICO decisions. ____ U.S. ____, 105 S.Ct. 3550, 87 L.Ed.2d 673 (1985). By order dated September 23, 1985, the Second Circuit vacated my Opinion and Order and remanded the matter to me for further consideration of defendants' motions in light of the Supreme Court's actions in *Sedima* and *Haroco*. 779 F.2d 36 (2d Cir.1985) (mem.).

Following remand, defendants renewed their motions to dismiss on the additional grounds that I had previously found it

unnecessary to consider, and I permitted the parties to file briefs supplementing their earlier submissions. I have carefully considered the parties' submissions, and for the reasons set forth below, defendants' motions are granted in part and denied in part as indicated.

Background

The allegations of the complaint, which must be accepted as true for purposes of the present motions, *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553 (2d Cir.1977); *Gumer v. Shearson, Hammill & Co., Inc.*, 516 F.2d 283, 286 (2d Cir.1974), are as follows: The principal actors in the scheme to defraud Bankers were the Braten Apparel Corporation ("BAC"), a corporation that owed Bankers some $4,000,000; defendant Milton Braten ("Braten"), an officer and principal shareholder of BAC; defendant Daniel Rhoades ("Rhoades"), an officer, director, and/or shareholder of BAC, and an attorney for BAC and Braten; defendant Soifer, a shareholder of BAC; and Walter Feldesman ("Feldesman"), an attorney who represented BAC, Soifer, and defendant Brookfield Clothes, Incorporated ("Brookfield"). Braten, Rhoades, and Soifer were also officers, directors, and/or shareholders of all of the other corporate defendants named in the complaint.

In August 1974, at a time when BAC had recently sustained severe financial losses and owed substantial debts to Bankers and others, BAC acquired all of the stock of Brookfield, which at that time had a net worth of more than $3,000,000. Complaint ¶ 11. Braten, Soifer, and Feldesman allegedly made a secret agreement to conceal this acquisition for the purpose of obtaining a favorable discharge of BAC's debts by pursuing chapter XI proceedings in the bankruptcy court. *Id.* ¶ 13.

To implement the plan, Braten and Soifer executed a sham "Shareholder's Agreement," drafted by Feldesman, which provided that if BAC or Braten did not furnish a $250,000 loan to Brookfield by a specified date, BAC's stock in Brookfield would automatically be transferred to Soifer. *Id.* ¶¶ 14-15. At the time this agreement was entered into, Braten, Feldesman,

and Soifer knew that the funding condition would not be met. They intended that Soifer would hold the stock of Brookfield, safe from the claims of BAC's creditors, only during BAC's bankruptcy proceedings; Soifer was to return the stock to BAC following the corporation's discharge in bankruptcy. *Id.* ¶¶ 16-17.

On September 5, 1974, BAC's stock in Brookfield was transferred to Soifer and BAC filed its petition in bankruptcy. *Id.* ¶ 18. BAC did not list the Brookfield stock as an asset. *Id.* Braten, Rhoades, Soifer, and Feldesman thereafter affirmatively misrepresented to Bankers and the bankruptcy court that BAC had, through failure to meet the Shareholder's Agreement funding condition, lost its ownership of the Brookfield stock. *Id.* ¶¶ 19-20. Through this and related misrepresentations, Feldesman and the individual defendants induced BAC's creditors, including Bankers, to approve a plan of arrangement under which Bankers would receive only 17.5% of its claims and BAC would be relieved of more than $4.3 million of its debts. *Id.* ¶¶ 21-22. Had BAC's stock in Brookfield been included in BAC's plan of arrangement, BAC would have had assets sufficient to satisfy Bankers' claims in full. *Id.* ¶¶ 23-24.

BAC's plan of arrangement was approved by the bankruptcy court on March 12, 1976. *Id.* ¶ 22. In August 1976, Soifer returned the Brookfield stock to BAC through a complicated sequence of stock transfers. *Id.* ¶ 25. Soifer, Braten, and Rhoades then revealed to Brookfield's auditors that BAC had in fact owned this stock all along. *Id.* ¶ 26. In October 1976, Soifer purchased 45% of the stock of BAC. *Id.* ¶ 27. In July 1977, Soifer gave Braten a $450,000 note in part payment for the BAC stock. *Id.*

In September 1976, Bankers commenced a proceeding in the bankruptcy court under section 386 of the Bankruptcy Act of 1898, former 11 U.S.C. § 786, to revoke the confirmation of BAC's plan of arrangement because of the fraudulent concealment of BAC's ownership of the Brookfield stock. *Id.* ¶ 28. On June 25, 1982, following lengthy proceedings including a trial, the bankruptcy court revoked the confirmation, *see In re Braten Apparel Corp.*, 21 B.R. 239 (Bankr.S.D.N.Y.1982), finding that the individual defendants had devised and carried out a

scheme to defraud by making false statements and oaths in BAC's listing of the assets of the estate, and by intentionally concealing property of BAC. *Id.* ¶¶ 42-43. The bankruptcy court ordered BAC to "offer a plan which is realistic . . . in light of the fact that [it] owns a valuable asset—Brookfield." 21 B.R. at 263. The bankruptcy court's decision was affirmed by the district court, *In re Braten Apparel Corp.*, 26 B.R. 1009 (S.D.N.Y.1983), and the district court's decision was affirmed by the court of appeals by summary order entered on September 1, 1983, *In re Braten Apparel Corp.*, 742 F.2d 1435 (2d Cir.1983) (mem.).

In the meantime, however, BAC had entered into a new scheme to protect many of its assets from its creditors. Its principal action, again, was to transfer its stock in Brookfield. *Id.* ¶ 41. In January 1982, defendant Bennington Court Limited ("Bennington") borrowed almost nine million dollars from KB Business Credit, Incorporated ("KBBC"), a financing company. *Id.* ¶ 36. Bennington then gave these funds to several of the other defendants in this case. *Id.* When the funds were not repaid, KBBC brought a civil RICO action for treble damages against BAC, Braten, Rhoades, and others. *Id.* ¶¶ 37-38. The defendants quickly settled the lawsuit by having BAC convey its stock in Brookfield—for little or no consideration—to defendant Todd Equipment Leasing Company, Incorporated ("Todd"), which in turn pledged the stock to KBBC. *Id.* ¶¶ 39-40. As a result, BAC was able to frustrate Bankers' attempt in the bankruptcy court to obtain some benefit from BAC's earlier ownership of the stock of Brookfield.

Bankers also alleges that during the perpetration of BAC's initial bankruptcy fraud, BAC and the individual defendants instituted several frivolous lawsuits against Bankers in New York state court, alleging that Bankers had breached a commitment to extend additional credit to BAC and seeking millions of dollars in damages. *Id.* ¶ 29. The only purpose of these suits was to hinder Bankers' collection of the debt owed to it by BAC. *Id.* Each suit was summarily dismissed, but not before Bankers had incurred substantial legal expenses. *Id.*

In August 1977, BAC instituted an action against Bankers in South Carolina based on claims similar to those asserted in the

New York actions, seeking $195 million in damages. *Id.* ¶ 30. Braten brought another action in South Carolina, asserting claims, allegedly superior to those of Bankers, to funds in an escrow account derived from the sale of machinery in which Bankers had a security interest. *Id.* Rhoades acted as counsel to a South Carolina law firm representing BAC and Braten in these actions and, according to the complaint, proceeded to bribe William H. Ballenger, the judge before whom the actions were pending. *Id.* ¶¶ 30-34.

Rhoades allegedly used a South Carolina corporation formed by him to assume a mortgage debt on which Judge Ballenger was personally liable to the extent of $100,000. *Id.* ¶ 32. Rhoades thereafter made payments on the debt as installments came due. *Id.* Rhoades' actions induced Judge Ballenger to render at least two decisions favorable to Braten and BAC: (1) in Braten's action to collect from the escrow account, Judge Ballenger appointed a former partner of the law firm to which Rhoades was counsel as a "special referee" with the power to deny Bankers a jury trial; and (2) in BAC's $195 million damage action, Judge Ballenger arbitrarily denied Bankers' motion to dismiss. *Id.* ¶ 33. Judge Ballenger eventually recused himself from the escrow account action after citing a "possible conflict of interest," and his special referee resigned. *Id.* ¶ 34. In the BAC action, the South Carolina Supreme Court reversed Judge Ballenger's denial of Bankers' motion to dismiss as an abuse of discretion. *Id.* In the meantime, however, Bankers had expended more than $100,000 in defending the South Carolina cases. *Id.*

Discussion

As noted above, the moving defendants advance a number of grounds in support of their motion for judgment on the pleadings: (1) Bankers has not adequately alleged a pattern of racketeering activity, (2) Bankers' RICO claim belongs to BAC and may be asserted only by BAC's trustee in the pending bankruptcy proceeding, and (3) Bankers' RICO claim is time-barred regardless of which statute of limitations is applicable. I address each of these arguments in turn below.

Pattern Allegations

Each defendant has moved for judgment on the pleadings on the ground that Bankers has not adequately alleged a pattern of racketeering activity as required by RICO. Section 1964(c) provides a civil remedy to "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c) (1982). Section 1962 makes it unlawful (1) to use income derived from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce, *id.* § 1962(a); (2) to acquire or maintain an interest in such an enterprise "through" a pattern of racketeering activity, *id.* § 1962(b); or (3) to conduct or participate in the conduct of such an enterprise through a pattern of racketeering activity, *id.* § 1962(c). *Sedima*, 105 S.Ct. at 3278. Section 1962(d) prohibits conspiring to violate any of these three provisions. *Id.* A "pattern of racketeering activity" "requires" the commission of "at least two acts of racketeering activity." 18 U.S.C. § 1961(5). The enumerated acts of racketeering activity include nine state law felonies and the violation of more than 25 federal statutes. *Id.* § 1961(1).

Bankers has alleged that defendants violated each of the three subdivisions of section 1962 and conspired to do so. Complaint ¶¶ 50-53. Bankers contends that it has sufficiently alleged a pattern consisting of three acts of bankruptcy fraud and one act of bribery: (1) the fraudulent conveyance of the Brookfield stock to Soifer in 1974 in contemplation of BAC's bankruptcy, Complaint ¶¶ 44, 49; (2) the making of false oaths in BAC's schedules and the giving of false testimony under the penalty of perjury, Complaint ¶¶ 45, 49; (3) the 1982 conveyance of the Brookfield stock to Todd and Todd's pledging that stock to relieve the defendants of personal liability in connection with the KBBC lawsuit, Complaint ¶¶ 48-49; and (4) the bribery of Judge Ballenger, Complaint ¶¶ 47, 49.

Soifer contends that Bankers has not alleged that he committed two predicate acts. There is no dispute that he is named in the complaint in connection with the first two predicate acts listed above. *See* Complaint ¶¶ 11-20. It is equally clear that there are no allegations directly implicating Soifer in the com-

mission of predicate acts three and four above. Indeed, the complaint does not allege that he played any active role in the scheme to defraud Bankers after the confirmation of BAC's plan of arrangement in 1976.[2]

Soifer asserts that even though he is alleged to have participated in both the initial fraudulent conveyance and the subsequent concealment of the Brookfield stock, those acts are in reality a single offense. Soifer argues that Bankers has impermissibly attempted to split a single violation of the bankruptcy fraud statute, 18 U.S.C. § 152 (1982), into separate offenses in order to allege the requisite two predicate acts. He contends that the commission of multiple acts proscribed by § 152 constitutes a single criminal offense so long as the acts involve the same asset of the debtor. Supplemental Reply Memorandum of Law of Defendant Herman Soifer at 3. I disagree.

It is well settled that violations of more than one provision of § 152 are separately indictable offenses even if they pertain to the same asset of the debtor. *See, e.g., United States v. Gordon*, 379 F.2d 788, 790 (2d Cir.), *cert. denied*, 389 U.S. 927, 88 S.Ct. 286, 19 L.Ed.2d 277 (1967). In *Gordon*, our court of appeals observed that the separate paragraphs of the bankruptcy fraud statute, 18 U.S.C. § 152 (1982), "create separate crimes, the violation of which may be indicted separately." 379 F.2d at 790. It is true that a defendant cannot be separately convicted of violating § 152 by concealing an asset during bankruptcy, and of violating § 152 by filing a schedule with the bankruptcy court that is false because it does not disclose the same asset.

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2 Bankers' allegations with respect to the 1982 bankruptcy fraud are contained in paragraphs 36 through 40 of the complaint. These paragraphs contain only one indirect reference to Soifer. He is one of several people alleged to have been a beneficial owner of Capital Aid Corporation; that corporation in turn is alleged to have owned Todd, the company through which the Brookfield stock was pledged to KBBC. Bankers does not allege that Soifer received any of the funds borrowed from KBBC, and Soifer was not named as a defendant in the KBBC lawsuit. Similarly, the allegations concerning the frivolous lawsuits and the bribery of Judge Ballenger are contained in paragraphs 29 through 34 of the complaint. These paragraphs make no reference to Soifer, either direct or indirect. All of the allegations concern Braten, Rhoades, and BAC.

See, e.g., United States v. Ambrosiani, 610 F.2d 65, 68-69 (1st Cir.1979), *cert. denied*, 445 U.S. 930, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980). The filing of the false schedule is simply the means by which the asset was concealed during bankruptcy. However, it is clear that a defendant may be separately indicted for fraudulently transferring an asset and subsequently concealing the same asset by making false statements. *See Gordon*, 379 F.2d at 790; *accord Ambrosiani*, 610 F.2d at 68. This is precisely the situation presented here. Bankers has alleged that the Brookfield stock was fraudulently conveyed to Soifer who concealed it in contemplation of BAC's bankruptcy, and that Soifer concealed the stock from BAC's trustee and the bankruptcy court during bankruptcy by making false statements. There can be little doubt that this is sufficient to allege two separate violations of the bankruptcy fraud statute, and hence two separate acts of racketeering activity.

Soifer next contends that even if Bankers has adequately alleged two separate acts of racketeering activity, those acts do not constitute a pattern. He relies on a number of post-*Sedima* decisions embellishing (and thereby narrowing) RICO's pattern requirement. These cases represent the latest attempt to limit the "extraordinary uses to which civil RICO has been put," *Sedima*, 105 S.Ct. at 3287. I am not unsympathetic to the desire of federal judges "to dam the flood of civil RICO cases which on their face look like basic common law breach of contract and fraud cases." *Papai v. Cremosnik*, 635 F.Supp. 1402, 1406 (N.D.Ill.1986). Indeed, as noted above, this Court was among many courts in holding pre-*Sedima* that RICO required proof of a racketeering injury and not merely a direct injury from the underlying predicate acts. Other courts focused on other doctrines in order to limit the reach of the statute. For example, some courts required a "nexus to organized crime," *see, e.g., Moss v. Morgan Stanley Inc.*, 553 F.Supp. 1347, 1361 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir.1983), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984); *Noonan v. Granville-Smith*, 537 F.Supp. 23, 29 (S.D.N.Y.1981); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 112-13 (S.D.N.Y.1975), while other courts sought to limit "enterprise" to "legitimate business enterprises," *see, e.g., United*

States v. Turkette, 632 F.2d 896, 903 (1st Cir.1980), *rev'd*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

However, the Supreme Court in *Sedima* stated clearly that such doctrines have no reasonable basis in the language of the statute, 105 S.Ct. at 3284-85, and that any change in the statute must come from Congress, *id.* at 3287. The Court also emphasized:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes." The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

105 S.Ct. at 3286 (citations omitted).

Despite this clear admonition, some courts have construed other language in *Sedima* as an invitation to continue the restriction of the statute on the "pattern" front. In particular, they have focused on the Court's observation that "[t]he 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offense, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern,' " 105 S.Ct. at 3287. They also rely on the Court's comments in footnote 14. There the Court stated:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance, two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus

> not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli v. United States*, 420 U.S. 770, 789, 95 S.Ct. 1284, 1295, 43 L.Ed.2d 616 (1975).

Sedima, 105 S.Ct. at 3285 n. 14 (emphasis in original).

The courts that have adopted a restrictive view of pattern have focused principally upon the reference to 'continuity" in footnote 14, and have concluded that "pattern" requires multiple criminal "episodes" or "transactions" "sufficiently unconnected in time" yet not "isolated" or "sporadic." *See, e.g., Frankart Distributors, Inc. v. RMR Advertising, Inc.*, 632 F.Supp. 1198, 1200-01 (S.D.N.Y.1986); *Soper v. Simmons Int'l, Ltd.*, 632 F.Supp. 244, 253-54 (S.D.N.Y.1986).

Other courts reject this restrictive view. They focus mainly on the perceived concern in footnote 14 that RICO not be used to reach sporadic or isolated activity, and require only that the predicate acts be related. *See, e.g., Conan Properties v. Mattel, Inc.*, 619 F.Supp. 1167, 1171 (S.D.N.Y.1985).

For a number of reasons, I find myself in agreement with this less restrictive approach. First, footnote 14 simply is not a basis for the doctrine that has arisen from it. The footnote makes no mention of multiple "episodes," "transactions," or "schemes." The primary if not the sole focus of footnote 14 is on the need for some relationship between the predicate acts constituting the pattern. Thus, the Court quotes 18 U.S.C. § 3575(e) (1982), which requires only a connection between criminal acts. In addition, the Court quotes the Senate Report on RICO as supportive of the proposition that "two isolated acts of racketeering activity do not constitute a pattern." The Senate Report states:

> The concept of "pattern" is essential to the operation of the statute. *One isolated "racketeering activity" was thought insufficient* to trigger the remedies provided . . . largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires *more than one 'racketeering activity' and the threat of continuing activity* to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.

Organized Crime Control Act of 1969, S.Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) (emphasis added). It seems clear from this language that the continuity aspect is satisfied by the existence of a second predicate act, and that the relationship aspect is satisfied by some connection between the acts.

Second, the so-called "episode" test is vague and unpredictable. As Judge John F. Grady observed in *Brainerd & Bridges v. Weingoff Enterprises, Inc.*, No. 85 Civ. 493 (JFG) (N.D.Ill. July 22, 1986), some courts have found one episode in fact situations where others have not, leading to inconsistent results. In addition, the episode test places undue emphasis on the way predicate offenses are portrayed in pleadings. *See Litigating the Pattern Element in Civil RICO Cases*, Nat'l L.J., Sept. 1, 1986, at 20. Finally, I am concerned that the episode test is overbroad, and may eliminate from RICO's ambit some cases Congress surely meant to include. For example, under the episode

test an act of arson followed by an attempt to extort money from the victim by telephone would undoubtedly be considered a single episode, yet surely this is the sort of conduct that Congress sought to reach. I agree with Judge Grady that the "episode" test smacks of an "I know it when I see it" approach, and find such a vague and unpredictable test unacceptable. *See Brainerd & Bridges*, slip op. at 16. Accordingly, I conclude that until Congress indicates otherwise, a pattern of racketeering activity is alleged when a plaintiff claims two or more connected criminal acts listed in § 1961(1). *Accord Conan Properties v. Mattel, Inc.*, 619 F.Supp. 1167, 1171 (S.D.N.Y.1985); *see also Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir.1986); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir.1985); *Tryco Trucking Co., Inc. v. Belk Stores Servs., Inc.*, 634 F.Supp. 1327, 1334 (W.D.N.C.1986).

Under this standard, Bankers' pattern allegations are clearly sufficient. Bankers has alleged that the Brookfield stock was fraudulently conveyed to Soifer who concealed it in contemplation of BAC's bankruptcy, and that Soifer concealed the stock from BAC's trustee and the bankruptcy court during bankruptcy by making false statements. Each of these acts constituted bankruptcy fraud, and the acts are clearly connected.

As noted above, Braten and Rhoades also challenge the sufficiency of Bankers' pattern allegations. They press the same points as Soifer. These arguments are even more unavailing when applied to the allegations against these defendants. Braten and Rhoades are alleged to have played major roles in the commission of each of the four predicate acts set out above. There is no question that Bankers has adequately alleged a pattern as to Braten and Rhoades.

The situation with respect to the other moving defendants is quite different, however. These defendants are various corporate entities of which Braten, Rhoades, and Soifer are alleged to be officers, directors, and/or shareholders and for which Rhoades served as counsel. The only specific references to any of these defendants are in connection with the 1982 bankruptcy fraud. Some of them are never mentioned by name. Because the complaint contains numerous collective references to "the

defendants," it is impossible to determine whether they are alleged to have played any part in the initial bankruptcy fraud or the bribery of Judge Ballenger. Standing alone, the pledging of the Brookfield stock in 1982 is insufficient to constitute a RICO pattern. Accordingly, Bankers' complaint is dismissed as against the corporate defendants for failure to allege a pattern of racketeering activity with sufficient particularity. Bankers may replead within thirty days if it can allege with more specificity that any of these defendants actively engaged in two or more predicate acts of racketeering activity. If Bankers chooses to replead, it should separately number and state its allegations as to each corporate defendant, rather than lumping them together and referring to them collectively as "the defendants."

Standing to Assert the RICO Claim

Defendants next contend that Bankers' RICO claim belongs to BAC, and may be asserted only by BAC's trustee in the pending bankruptcy proceeding. This contention is also without merit. *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843 (2d Cir.1986), and *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir.1910), on which defendants rely, hold that an action to redress injuries to a corporation cannot be maintained by a creditor or a shareholder in his own name, but rather must be brought in the name of the corporation. However, those cases are inapposite. In this case, Bankers is not suing derivatively to redress injuries to BAC, but rather to redress injuries Bankers suffered in its own right. BAC was not harmed by the 1976 bankruptcy fraud. It had more assets after the confirmation that it would have had absent defendants' fraudulent acts. Moreover, Bankers' RICO claim is also based upon the bribery of Judge Ballenger, which caused Bankers to expend more than $100,000 in defending frivolous lawsuits. Defendants engaged in these acts to benefit BAC, not to harm it, and the resulting injury was suffered only by Bankers and not by BAC. Defendants' contention that "legal expense is not damage" is clearly meritless. Accordingly, I conclude that Bankers does not lack standing to assert the instant civil RICO claim.

The Statute of Limitations for Civil RICO Claims

Finally, defendants contend that Bankers' RICO claim is barred by the applicable statute of limitations. The Racketeer Influenced and Corrupt Organizations Act does not contain a specific statute of limitations governing civil RICO actions—" 'a void which is commonplace in federal statutory law.' " *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 1942, 85 L.Ed.2d 254 (1985) (quoting *Board of Regents v. Tomanio*, 446 U.S. 478, 483, 100 S.Ct. 1790, 1794, 64 L.Ed.2d 440 (1980)). When Congress has not established a limitation period for a federal cause of action, the settled practice is to "borrow" the most analogous statute of limitations of the forum state if it is not inconsistent with federal law or policy to do so. *See, e.g., id.* at 1942-43; *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84, 488, 100 S.Ct. 1790, 1794-95, 1797, 64 L.Ed.2d 440 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975); *see generally* Note, *Limitation Borrowing in Federal Courts*, 77 Mich. L.Rev. 1127 (1979).

Defendants urge the Court to apply the three-year New York statute of limitations governing actions to enforce a liability created by statute, N.Y.Civ.Prac.Law § 214(2) (McKinney 1972). They rely on *Durante Bros. & Sons, Inc. v. Flushing National Bank*, 755 F.2d 239 (2d Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 3530, 87 L.Ed.2d 654 (1985), for the proposition that § 214(2) is to be applied to all civil RICO claims arising in New York regardless of the factual basis of the particular claim. On the other hand, Bankers would have the Court apply the six-year New York statute of limitations governing actions based on fraud, N.Y.Civ.Prac.Law § 213(8) (McKinney 1972). It contends that *Durante* does not endorse the uniform application of a three-year statute of limitations to all civil RICO actions. According to Bankers, courts must instead select an appropriate limitation period for each RICO claim based upon the nature of the underlying predicate acts.

Unfortunately, *Durante*, the only case in which our court of appeals has considered the borrowing of statutes of limitations for RICO claims, does not resolve this question. In *Durante*,

the plaintiff brought a civil RICO action predicated upon the alleged collection of an unlawful debt. The district court concluded that the most analogous statute of limitations was the one-year New York statute governing actions to recover an overcharge of interest, N.Y.Civ.Prac.Law § 215(6) (McKinney 1972), and dismissed the plaintiff's suit as time-barred. The court of appeals reversed. It pointed out that the district court's seemingly apt analogy dissolved when the elements of the RICO claim were closely examined. The court observed that the plaintiff would have to prove no fewer than ten elements to make out his RICO claim while he could establish a state law claim governed by § 215(6) by proving only one of them. The court then concluded,

> There being no state law analog to the present civil RICO claim, we conclude that the most appropriate state statute of limitations is that found in CPLR § 214(2), governing actions to enforce a liability created by statute.

755 F.2d at 249.

Since *Durante* was decided, three judges in this district have addressed the borrowing of statutes of limitations for civil RICO actions. Each judge was faced with the difficult question of whether a uniform statute of limitations should be applied to all RICO claims or whether the appropriate limitation period should be determined on a case-by-case basis. In *Fustok v. Conti-Commodity Services, Inc.*, 618 F.Supp. 1076 (S.D.N.Y. 1985), the plaintiff brought a civil RICO action alleging that various defendants had engaged in a pattern of racketeering activity through the commission of predicate acts of mail and wire fraud. On the eve of trial, the defendants moved to dismiss the RICO claim as time-barred, relying on *Durante* for the proposition that the three-year limitation period of CPLR § 214(2) is uniformly applicable to all civil RICO claims regardless of the underlying predicate offense. The plaintiff opposed the motion, arguing that the statute of limitations applicable to civil RICO claims varies with the offense underlying each RICO claim. Judge Lasker noted that he found the *Durante* opinion "puzzling in that it [was] not clear to [him] whether the court intended to establish a general rule for RICO limitation

periods," and observed that "in any event the opinion does not state a rule of general applicability *in haec verba*." 618 F.Supp. at 1081. Because *Durante* did not settle the question before him, Judge Lasker turned to the pre-*Durante* decisions of the district judges in this circuit, and to district and circuit court decisions in other circuits. Although he found both groups of decisions divided, he nonetheless concluded that there was "considerable authority . . . to support the proposition that the New York statute of limitations governing the state action which most closely resembles the basis for the RICO claim should apply." *Id.* Judge Lasker therefore chose the six-year New York period of limitation governing actions based on fraud.[3]

In *Von Bulow v. Von Bulow*, 634 F.Supp. 1284 (S.D.N.Y. 1986), Judge Walker was faced with the same question that had arisen in *Fustock*. He found it unnecessary to resolve the issue, however, because he concluded that, due to tolling, the action was timely regardless of what period was applicable. Nonetheless, Judge Walker noted in dictum that he was "inclined to the view that the Second Circuit did not intend a uniform rule and to agree with Judge Lasker in *Fustock*." *Id.* at 1301.

The only other post-*Durante* decision in this district to address the appropriate statute of limitations to apply to civil RICO claims is *Bartels v. Clayton Brokerage Co. of St. Louis, Inc.*, 631 F.Supp. 442 (S.D.N.Y.1986). The plaintiffs in *Bartels* brought a civil RICO action alleging that defendants had committed predicate acts of mail and wire fraud in furtherance of a commodities fraud scheme. While acknowledging that the general rule when a federal statute does not specify a limitation

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3 It is not clear to what extent Judge Lasker based his decision on "strong, practical considerations." Judge Lasker noted that the case was "about ready to go to trial," "that the bulk of discovery [had] been completed," and that proof of the RICO allegations would not add significantly to the length of the trial. In contrast, he observed that "[d]ismissal of the RICO claim would run the risk of a costly retrial in the event that the Court of Appeals subsequently clarifies its position on the appropriate limitations period in agreement with plaintiff's understanding." "Bearing in mind these legal and policy considerations," Judge Lasker concluded that the motion to dismiss the RICO claim as time-barred should be denied. 618 F.Supp. at 1081.

period is to borrow an analogous state statute of limitations, Judge Goettel observed that "when federal policies are at stake, courts have not hesitated to look for a timeliness rule in federal law that provides a closer analogy." *Id.* at 449 (citing *Del-Costello v. International Bhd. of Teamsters*, 462 U.S. 151, 171-72, 103 S.Ct. 2281, 2294-95, 76 L.Ed.2d 476 (1983)). Judge Goettel noted that the RICO statute envisions a *national* policy to fight organized crime, and concluded that its enforcement should therefore proceed in as uniform a manner as possible. In view of the need for uniformity in administering civil RICO actions and the fact that the plaintiffs' allegations rested on violations of the Commodities Exchange Act ("the CEA"), Judge Goettel found it proper to borrow the two-year statute of limitations governing private actions under the CEA. Although this is not clear from Judge Goettel's opinion, it appears likely that he was suggesting that, where the predicate offenses are federal, courts should choose the appropriate federal statute of limitations rather than the state statute applicable to the most analogous state claim. *But see A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 337-41 (3d Cir.1986) (Sloviter, J., concurring in the judgment) (arguing that the four-year federal statute of limitations applicable to claims under the Clayton Antitrust Act should be applied to all civil RICO claims), *discussed infra* note 3. Thus, it would appear that, like Judges Lasker and Walker, Judge Goettel has endorsed a case-by-case determination of the appropriate statute of limitations for each civil RICO action.

In view of these cases, I am faced with two immediate questions. First, whether to fill the void in the RICO statute by adopting a state statute of limitations or a federal one. And second, regardless of the source of the statute, whether to borrow the same statute for all RICO claims, no matter what their factual underpinnings, or to choose the appropriate statute based on an examination of the factual circumstances presented in each case.

Durante at least suggests the answer to the first of these questions. The court of appeals began its discussion of the statute of limitations question with the observation that "[s]ince RICO does not contain its own statute of limitations, and there is no

other apparently relevant federal statute of limitations for RICO claims, the [district] court was required to apply the most appropriate limitations period provided by state law." 755 F.2d at 248 (citing *Board of Regents v. Tomanio*, 446 U.S. 478, 485, 100 S.Ct. 1790, 1795-96, 64 L.Ed.2d 440 (1980), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975)). The court was presumably aware of and rejected the option of borrowing from a federal statute. In addition, the great weight of authority is that state law is the appropriate source from which to borrow the limitation period for civil RICO claims. *See A.J. Cunningham*, 792 F.2d at 338 (Sloviter, J., concurring in the judgment); A.B.A. Section of Corporation, Banking and Business Law, *Report of the Ad Hoc Task Force on Civil RICO* 387 (1985) [hereinafter cited as "*A.B.A. Civil RICO Report*"]. To the Court's knowledge, only Judge Goettel, in *Bartels v. Clayton Brokerage Co. of St. Louis, Inc.*, 631 F.Supp. 442 (S.D.N.Y.1986), and Judge Sloviter, concurring in the judgment in *A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330 (3d Cir.1986),[4] have looked to federal law. *Cf. Creamer v. General Teamsters Local Union 326*, 579 F.Supp. 1284 (D.Del.1984) (considering and rejecting the contention that a statute of limi-

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4 Judge Sloviter filed opinions concurring in the judgment of the panel in both *A.J. Cunningham* and its companion case, *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir.1986), *discussed infra* pp. 485-488. She characterized civil RICO "as a congressionally provided remedy for repeated criminal behavior that results in economic injury," and noted that the "civil remedy provided in the Clayton [Antitrust] Act has a similar purpose." *A.J. Cunningham*, 792 F.2d at 340. Judge Sloviter went on to note the strong analogy between the two:

> Both section 4 of the Clayton Act and the civil enforcement provision of RICO provide for the recovery of three-fold damages and the cost of suit including a reasonable attorney's fee. Both require the plaintiff to prove an injury "in his business or property by reason of" a violation. Moreover, Congress explicitly used the Clayton Act as the model for the civil provisions of RICO.

Id. (citations omitted). Judge Sloviter also found it "more satisfying intellectually to apply [a statute of limitations] to which Congress has given its specific attention, as it did when it amended the Clayton Act to provide a four

tations under the National Labor Relations Act should apply to a RICO claim involving labor union activities). Finally, even in *DelCostello*, where the Supreme Court chose a federal statute, it stated that "resort to state law remains the norm for borrowing of limitations periods," 462 U.S. at 171, 103 S.Ct. at 2294, and that "absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions," *id.* at 158 n. 12, 103 S.Ct. at 2287 n. 12. I am not persuaded that the nature of civil RICO claims is such that courts should look to federal rather than state law.

Having decided to borrow a state statute of limitations, I turn to the second question set out above—namely, whether to treat all civil RICO claims similarly, without considering the factual circumstances presented in each case, and to apply the same statute of limitations to all RICO claims, or to characterize each RICO claim on the basis of its particular factual underpinnings and to apply that statute which is most analogous in each case. On this question, I agree with Judges Lasker and Walker that *Durante* is not dispositive. As Judge Lasker noted in *Fustock*, the court of appeals did not seem to be announcing a rule for all civil RICO cases. Rather, it would appear to have been concerned simply with the one case before it. On the other hand, I note that it would not be inconsistent with *Durante* to apply the statute that defendants urge the Court to apply, since that is the very statute that the court of appeals selected in *Durante*.

Because *Durante* is not dispositive of the issue before me, I turn to the decisions of the other courts of appeals. At the outset, I note that the law in this area is unsettled. Only two circuit courts appear to have directly addressed the question, and they reached opposite conclusions. The Court of Appeals for the Third Circuit has held that a single statute of limitations should apply to all RICO claims brought in the third circuit. *Malley-*

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year statute of limitations, than to apply one to which the state legislatures have given no specific attention and which they swept up instead in a 'catch all.' " *Id.* at 340-41 (citations omitted). Judge Sloviter therefore concluded that all RICO claims should be measured by the four-year statute of limitations applicable to Clayton Act claims. *Id.* at 341.

Duff & Assocs., Inc. v. Crown Life Ins. Co., 792 F.2d 341, 349 (3d Cir.1986) ("[I]n borrowing state limitations periods for civil RICO claims courts must select, in each state, the *one* most appropriate statute of limitations for *all* civil RICO claims.") (emphasis in original). The Court of Appeals for the Sixth Circuit has taken a different view. Without engaging in as detailed an analysis as the Court of Appeals for the Third Circuit, it held that the selection of the appropriate statute of limitations for civil RICO claims must be made on a case-by-case examination of the underlying predicate acts. *Silverberg v. Thomson McKinnon Sec., Inc.*, 787 F.2d 1079, 1083 (6th Cir.1986) ("[T]he selection of the applicable state limitations period in the individual case should be made on the basis of a characterization of the kind of factual circumstances and legal theories presented.").

Two other courts of appeals would apparently follow the uniform approach. The Court of Appeals for the Eleventh Circuit has hinted in dictum that it too would apply a single state limitations period to all RICO claims. *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1014 n. 4 (11th Cir.1986) ("[T]he key lesson of *Wilson* seems to be that there should be applied 'in each State . . . the one most appropriate statute of limitations' for all RICO actions.") (citations omitted) (quoting *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985)). And, although it has not said so explicitly, the Court of Appeals for the Ninth Circuit would appear to have adopted the uniform approach to the selection of a statute of limitations for RICO actions. *See Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir.1984) ("We . . . find that the California period of limitation applicable to state claims most analogous *to RICO civil actions* is the three year period for actions based on statute.").

Although some of the remaining courts of appeals have been called upon to select a state statute of limitations for civil RICO claims, they did not do so in a manner that reveals which approach they were following, if indeed they even considered the question. *See, e.g., Alexander v. Perkin Elmer Corp.*, 729 F.2d 576, 577 (8th Cir.1984). The district court decisions in these circuits have reached conflicting conclusions, much like the circuit court decisions discussed above, although the more

recent district court opinions appear to adopt the uniform approach with greater frequency.[5]

Having studied the question carefully, I find that I am most persuaded by the Third Circuit's well-reasoned and scholarly opinion in *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir.1986). That court based its analysis on *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), in which the Supreme Court considered the borrowing process for claims under section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), and concluded that all such claims should be treated the same way for limitations purposes.

The court of appeals began its analysis by noting that *Wilson* established a three-part inquiry to guide the selection of the statute of limitations that will govern a federal claim. First, the court must consider whether state law or federal law governs the characterization of the claim for statute of limitations purposes. Next, the court must decide whether all claims arising under the federal law should be characterized in the same way, or whether they should be evaluated differently depending on the varying factual circumstances and legal theories presented in each individual case. Finally, the court must characterize the essence of the claim in the case before it, and determine which state statute provides the most appropriate limiting principle. 792 F.2d at 345 (citing *Wilson*, 105 S.Ct. at 1943).

The court of appeals then applied this three-step inquiry. First, it considered whether federal or state law governs the characterization of civil RICO claims for statute of limitations purposes. The court recognized that the characterization of RICO claims, like that of § 1983 claims, "is derived from the elements of the cause of action and Congress' purpose in providing it," and that "[t]hese, of course, are matters of federal

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5 *See, e.g., Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F.Supp. 781 (E.D.La.1986); *Fink v. Meserve, Mumper & Hughes*, No. 84 Civ. 10382 (PHM) (N.D.Ill. June 19, 1986) [Available on WESTLAW, DCTU database]; *HMK Corp. v. John Walsey*, 637 F.Supp. 710 (E.D.Va.1986); *Ambrosino v. Rodman & Renshaw, Inc.*, 635 F.Supp. 968, 973-74 (N.D.Ill.1986); *Davis v. A.G. Edwards & Sons, Inc.*, 635 F.Supp. 707, 711 (W.D.La.1986); *Davis v. Smith*, 635 F.Supp. 459, 462 (N.D.Ill.1985).

law." *Wilson*, 105 S.Ct. at 1943. This being true, the confluence of the supremacy clause, U.S. Const. art. VI, cl. 2, and the Rules of Decision Act, ch. 646, 62 Stat. 944 (codified at 28 U.S.C. § 1652 (1982)), directs that the matter of characterization should be treated as a federal question. 792 F.2d at 346 (" 'If . . . federal law is both pertinent and valid, it applies because the supremacy clause of the Constitution so commands; if the federal law is impertinent or invalid, state law applies because Congress has so directed.' ") (quoting Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 Mich.L.Rev. 311, 316 (1980)). The court added that the "federal interest in uniformity and in having 'firmly defined, easily applied rules,' " which the Supreme Court emphasized in *Wilson*, applies with as much force to RICO as to other federal statutes, such as § 1983, § 301 of the Labor Management Relations Act, and the federal antitrust laws. 792 F.2d at 346.

After concluding that federal law controls the characterization of civil RICO claims for limitations purposes, the court turned to the second step in the *Wilson* inquiry—whether all claims arising under a particular federal law should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case. The court noted that in *Wilson*, the Supreme Court rejected the practice of parsing the particular allegations supporting an individual § 1983 claim, and instead looked to the federally-created cause of action for a broader analogy that could encompass all § 1983 claims brought in a given state.

The court of appeals outlined the considerations that led the Supreme Court in *Wilson* to select one limitation period for all § 1983 claims, and concluded that much of the Court's reasoning supported the same approach in the context of civil RICO claims. For example, the court of appeals observed that civil RICO is as far removed from any traditional state cause of action as is § 1983. It quoted those portions of the Second Circuit's opinion in *Durante* which made it clear that the RICO claim in that case differed significantly from a simple state law usury claim. The court opined that a similar analysis would apply to any RICO claim, since "concepts such as RICO 'enter-

prise' and 'pattern of racketeering activity' were simply unknown to common law, and all federal crimes contain jurisdictional and other elements irrelevant to any state civil action." 792 F.2d at 348. Thus, "as with § 1983, any analogies to traditional state causes of action 'are bound to be imperfect.' " 792 F.2d at 348 (quoting *Wilson*, 105 S.Ct. at 1945).

The court of appeals also noted that RICO presents the same danger identified in *Wilson* that two or more limitations periods could apply to one claim. Given the sheer number and variety of predicate acts that may constitute the pattern of racketeering activity in a given case, the particularized approach to borrowing statutes of limitations would " 'inevitably breed[ ] uncertainty and time-consuming litigation.' " 792 F.2d at 348 & n. 14 (quoting *Wilson*, 105 S.Ct. at 1945). The court observed:

> Even RICO claims based on "garden variety" business disputes might be analogized to breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc., with a multiplicity of applicable limitations periods. A state may even have different limitations periods for common law fraud and securities fraud. More extreme cases might include allegations sounding in assault, battery, false imprisonment, infliction of emotional distress, abuse of process, or trespass to land or chattels.

792 F.2d at 348 (citations omitted). The fact that RICO requires at least two predicate acts in all cases makes it even more likely that more than one analogy will have force in a given case. Unless the two alleged predicate acts are closely related, it is unlikely that both acts would be subject to the same statute of limitations. 792 F.2d at 348 & n. 14. The court of appeals therefore concluded "that in borrowing state limitations periods for civil RICO claims courts must select, in each state, the *one* most appropriate statute of limitations for *all* civil RICO claims. 792 F.2d at 349 (emphasis in original).

The court then turned to the final stage in the three-step inquiry—the selection of the one state statute to govern all civil

RICO actions arising in Pennsylvania, the state in which *Malley-Duff* arose. The court quickly rejected the Clayton Act's four-year statute of limitations for private treble damage antitrust suits:

> [A]lthough RICO and the Clayton Act both require injury to business or property for standing to sue, there is little overlap between the types of *conduct* that are prohibited; and [,] despite the fact that Congress consciously drew upon the antitrust model in drafting RICO, it did not include a comparable statute of limitations period, perhaps indicating a congressional intent that there not be a national standard.

792 F.2d at 350 n. 17. The court proceeded to choose among four Pennsylvania statutes of limitation: (1) the statute governing common law fraud actions, (2) the statute governing civil penalty or forfeiture actions, (3) a "potpourri" two-year statute of limitations, and (4) the "catchall" six-year residual statute of limitations. The court considered each in turn. The court observed that " 'the common law fraud analogy falls far short of capturing the multitude of factual bases on which RICO can be based,' " 792 F.2d at 351 (quoting *Electronic Relays (India) Pvt. Ltd. v. Pascente*, 610 F.Supp. 648, 651 (N.D.Ill.1985)), and concluded that "characterizing RICO as essentially a fraud action would be to have the tail wag the dog," *id.* The court also rejected the analogy to actions for civil penalty or forfeiture, noting that civil RICO is not a forfeiture statute, since a successful private plaintiff's recovery is based upon the injury sustained rather than on what the defendant gained through illegal conduct. Nor did the court think that the treble damage provision was intended primarily as a penalty. In addition, the court was concerned that the one-year Pennsylvania limitation period applicable to civil penalty or forfeiture actions was so short that it might contravene the broad remedial purposes of civil RICO. The court also rejected 42 Pa.Cons.Stat.Ann. § 5524 (Purdon Supp.1986), which it described as "a two-year statute of limitations, covering a potpourri of civil actions." The court found that this choice suffered from the "fundamental" failing that it does not "characterize the federal cause of

actions" as *Wilson* commands, but instead "seeks to take advantage of the fortuitous circumstance that a number of potential state law analogies share a common limitations period." As the court observed, "[s]uch an approach will provide little guidance for the resolution of this problem in other states, and may prove particularly vulnerable to changes in the state statute of limitations scheme." 792 F.2d at 352.

Finally, the court of appeals turned to Pennsylvania's "residual 'catchall' statute of limitations for actions, primarily based on statute, that are not governed by any more specific period of limitations." The court recognized that the Supreme Court had considered and rejected the application of such a catchall statute to § 1983 claims in *Wilson*. Nonetheless, it found that the Supreme Court's reasons for rejecting this particular analogy in the § 1983 context did not apply to RICO:

> RICO was enacted in 1970, long after statutory causes of action and corresponding catchall limitations periods became commonplace. Thus, it would not be disingenuous (or anachronistic) to suggest that Congress might have approved of borrowing such statutes. Second, RICO is a strictly statutory remedy to enforce statutory rights.

792 F.2d at 352. In further support of its choice, the court of appeals noted:

> Such an approach . . . recognizes that civil RICO is truly *sui generis* and that particular claims cannot be readily analogized to causes of action known at common law—the very observation that led us to search for a uniform limitations period in the first place. And, like personal injury statutes, the catchall statutes are particularly unlikely to be fixed in manner that would discriminate against federal claims.

792 F.2d at 353. The court observed that the American Bar Association's Ad Hoc Task Force on Civil RICO had specifically approved of cases characterizing RICO in this way. 792 F.2d at 352-53 (quoting *A.B.A. Civil RICO Report*, *supra* p. 29, at 389-91). Interestingly, the court of appeals cited *Durante* as one of the cases applying a catchall statute to a RICO claim.

792 F.2d at 353. Accordingly, the court of appeals concluded that all civil RICO actions arising in Pennsylvania would be governed by Pennsylvania's six-year residual statute of limitations, 42 Pa.Cons.Stat.Ann. § 5527 (Purdon Supp.1986).

I agree with the Third Circuit's general analysis in *Malley-Duff*, and conclude that I should select "the one most appropriate statute of limitations for all civil RICO claims." *Accord Teltronics Servs., Inc. v. Anaconda-Ericsson, Inc.*, 587 F.Supp. 724, 733 (E.D.N.Y.1984) (finding § 214(2) uniformly applicable to all RICO claims in New York), *aff'd on other grounds*, 762 F.2d 185 (2d Cir.1985). Of course, I must still engage in the third stage of the *Wilson* inquiry to determine which *New York* statute is the most appropriate. There are three apparent candidates, including those suggested by the parties: (1) the six-year statute governing actions based upon fraud, N.Y.Civ.Prac.Law § 213(8) (McKinney Supp.1986); (2) the six-year "omnibus" statute governing actions "for which no limitation period is specifically prescribed by law," *id.* § 213(1); and (3) the three-year statute governing actions "to recover upon a liability, penalty or forfeiture created or imposed by statute," *id.* § 214(2). I consider each in turn.

I reject § 213(8), governing actions based upon fraud, for essentially the same reasons that the Third Circuit rejected the corresponding Pennsylvania statute. Although many civil RICO actions have alleged wire, mail, or securities fraud as predicate acts,[6] the statute defines "racketeering activity" to include nine state law felonies and violations of over 25 federal statutes, including those prohibiting bribery, counterfeiting, embezzlement of pension funds, gambling offenses, obstruction of justice, interstate transportation of stolen property, and labor crimes. " 'The common law fraud analogy falls far short

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6 This trend has been the subject of increasing disquietude over the federalization of state common law. *See Sedima*, 105 S.Ct. at 3293 (Marshall, J., dissenting); 131 Cong.Rec. S10285-88 (1985) (remarks of Sen. Hatch). Many current proposals to curtail civil RICO are directed to precisely this point. For example, Senate Bill 1521, 99th Cong., 1st Sess. (1985), would require at least one predicate act other than mail, wire, or securities fraud to make out a civil RICO claim.

Malley-Duff, 792 F.2d at 351. *See also* Boucher, *Bill Curbing RICO's Use Advances*, Nat'l L.J., Sept. 1, 1986, at 15, col 1.

of capturing the multitude of factual bases on which RICO can be based,' " *Malley-Duff*, 792 F.2d at 351 (quoting *Electronic Relays*, 610 F.Supp. at 651), and to characterize RICO "as essentially a fraud action would be to have the tail wag the dog," *id.* I also find inapplicable § 213(1), the "omnibus" statute governing actions "for which no limitation period is specifically prescribed by law." Our court of appeals has observed that § 213(1) "has generally been understood to govern only actions for equitable relief." *Pauk v. Board of Trustees*, 654 F.2d 856, 863 (2d Cir.1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982) (citing *Singleton v. City of N.Y.*, 632 F.2d 185, 190 (2d Cir.1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981)).

On the other hand, I find that § 214(2) provides a compelling analogy to civil RICO claims. Section 214(2) encompasses actions based upon a "liability . . . created or imposed by statute." As New York's highest court has explained, § 214(2) is "applicable to actions for wrongs not recognized in the common or decisional law." *State v. Cortelle Corp.*, 38 N.Y.2d 83, 86, 341 N.E.2d 223, 224, 378 N.Y.S.2d 654, 656 (1975). Section 214(2) was applied to § 1983 claims in this circuit before the Supreme Court decided in *Wilson* that § 1983 claims must be analogized to personal injury actions, *see Pauk v. Board of Trustees*, 654 F.2d 856, 866 (2d Cir.1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982), and its predecessor was applied to private treble damage antitrust actions before the Clayton Act was amended to include a four-year statute of limitations, *see, e.g., Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 82 (2d Cir.) (Friendly, J.), *cert. denied*, 368 U.S. 821, 82 S.Ct. 39, 7 L.Ed.2d 26 (1961). Moreover, § 214(2) is the statute that our court of appeals chose to apply to the civil RICO claim in *Durante*. It would therefore seem particularly appropriate to analogize civil RICO actions to actions based upon a statutory liability, and to measure their timeliness with § 214(2).[7]

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7 My decision to apply § 214(2) may, at first blush, seem inconsistent with *Malley-Duff*, in which the Third Circuit rejected a somewhat similar

Accrual of Civil RICO Claims

Having concluded that civil RICO claims arising in New York are governed by a three-year statute of limitations, I must now determine the point at which such a claim accrues. Although state law specifies the duration of the limitations period, and the circumstances under which the period is tolled, *see, e.g., Wilson*, 105 S.Ct. at 1943 & n. 17, federal law determines the date on which the period begins to run. *Bowling v. Founders Title Co.*, 773 F.2d 1175, 1178 (11th Cir.1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1516, 89 L.Ed.2d 915 (1986) (citing *Rawlings v. Ray*, 312 U.S. 96, 98, 61 S.Ct. 473, 474, 85 L.Ed. 605 (1941)); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir.1984); *Singleton v. City of N.Y.*, 632 F.2d 185, 191 (2d Cir.1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981). Under the general federal rule, the statute of limitations begins to run when a plaintiff knows or has reason to know of the injury that is the basis for his action. *Bowling*, 773 F.2d at 1178; *Compton*, 732 F.2d at 1433; *Singleton*, 632 F.2d at 191.

Although the general rule is adequate for most federal causes of action, it presents two problems when applied to a civil RICO claim. First, a plaintiff may be injured before he has the right to sue under RICO. To bring a civil RICO claim, a private

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Pennsylvania statute of limitations. However, the Pennsylvania statute dealt only with statutory actions "for civil *penalty or forfeiture*," and the court of appeals found it inapplicable because it concluded that RICO was neither a forfeiture statute nor primarily a penalty statute. Unlike the Pennsylvania statute, § 214(2) explicitly encompasses actions based "upon a liability . . . created or imposed by statute." In addition, the court of appeals was concerned that the Pennsylvania statute, which provides a one-year limitations period, might be so short that it would contravene the broad remedial purposes of civil RICO. Section 214(2), on the other hand, provides a three-year limitations period, and would seem to strike an appropriate balance between the broad remedial purposes of RICO and the policies of repose. *Cf. Electronic Relays*, 610 F.Supp. at 653. ("Two years is certainly long enough to realize one has been injured by a RICO violation and and to bring suit. And the normal rules on accrual and tolling should ensure that no diligent RICO plaintiff will find his claim time-barred.") The Third Circuit's concerns are therefore not relevant here.

plaintiff must be injured "by reason of a violation of" one or more of the criminal provisions of RICO. 18 U.S.C. § 1964(c) (1982). Most such violations entail the commission of a "pattern of racketeering activity," *id.* § 1962, which, as defined by the statute, "requires at least two acts of racketeering activity," *id.* § 1961(5). There is no longer any doubt that the injury contemplated by § 1964(c) is nothing more than an injury from an act of racketeering activity. *Sedima*, 105 S.Ct. at 3285-86. Thus, if the first act of racketeering activity injures the plaintiff, the general federal accrual rule would start the statute of limitations running before the commission of the second predicate act. Yet, until the defendant commits the second act of racketeering activity, there can be no "pattern," there has been no violation of § 1962, and the plaintiff has no right to bring a civil RICO action.

Second, unlike most federal claims, which involve a single injury, a civil RICO claim will often involve multiple injuries.[8] By its very language, the RICO statute contemplates the commission of multiple acts by the defendant. Where the plaintiff is the victim of more than one of these acts, he may well suffer multiple injuries.

In the case of most federal causes of action, when a plaintiff suffers two injuries as a result of a defendant's conduct, each injury gives rise to a separate claim; the applicable limitation period runs separately on each claim from the time that the plaintiff knew or had reason to know of the corresponding injury. *See, e.g., Singleton*, 632 F.2d at 190-93 & n. 5 (§ 1983).

Courts have recognized an exception to this rule for certain practices which by their very nature involve an element of conti-

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8 Of course, the general federal rule may suffice for the garden variety RICO claim that arises out of a single fraudulent scheme involving, for example, a violation of the federal securities laws and multiple acts of mail and/or wire fraud, because in such a case the plaintiff usually suffers only a single injury. At least two courts of appeals have applied the general federal rule to civil RICO claims. *Bowling v. Founders Title Co.*, 773 F.2d 1175, 1178 (11th Cir.1985); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir.1984). The Eighth Circuit has also applied this standard to a civil RICO action. *Alexander v. Perkin Elmer Corp.*, 729 F.2d 576, 577 (8th Cir.1984). The court appears, however, to have been applying state law, which coincidentally specifies an identical accrual rule.

nuity. Under this exception, an action is timely as long as the last act evidencing the continuing practice falls within the limitation period, and courts will grant relief with respect to earlier related acts that would otherwise be time-barred. The "continuing violation" doctrine in employment discrimination cases provides a good example of this exception. *See, e.g., Held v. Gulf Oil Co.*, 684 F.2d 427, 430 (6th Cir.1982) (suit timely where pattern of discriminatory acts continues into the limitation period, even though discriminatory acts commenced prior to limitation period); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 105-06 (2d Cir.1978); *Acha v. Beame*, 570 F.2d 57, 65 (2d Cir.1978); *see generally* B. Schlei & P. Grossman, *Employment Discrimination Law* 1042-54 (2d ed. 1983).

RICO would seem an appropriate context in which to invoke this exception. By its terms RICO requires some degree of continuity. As noted above, a plaintiff cannot sue until the defendant has committed at least two predicate acts, and therefore in all likelihood caused two injuries. The Supreme Court suggested in *Sedima* that a RICO pattern requires not only two predicate acts, but also the "factor of *continuity plus relationship.*" *Sedima*, 105 S.Ct. at 3285 n. 14 (emphasis in original). Indeed, RICO's criminal provisions have been construed to create a continuing offense:[9]

> The Act provides an example of a continuing offense for purposes of computing the time at which the statute of limitations begins to run. The "nature of the crime . . . is such that Congress must assuredly have intended that it be treated as a continuing one." The language of the Act, which makes a pattern of conduct the essence of the crime, "clearly contemplates a prolonged course of conduct."

United States v. Field, 432 F.Supp. 55, 59 (S.D.N.Y.1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. denied*, 439 U.S. 801,

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9 The timeliness of a prosecution for a violation of the criminal provisions of RICO is measured by the five-year federal statute of limitations for non-capital offenses, 18 U.S.C. § 3282 (1982). Such a prosecution is timely if at least one act of racketeering is alleged to have occurred in the preceding five years. *United States v. Persico*, 621 F.Supp. 842, 872-73 (S.D.N.Y.1985).

99 S.Ct. 43, 58 L.Ed.2d 94 (1978) (quoting *Toussie v. United States*, 397 U.S. 112, 115, 120, 90 S.Ct. 858, 860, 863, 25 L.Ed.2d 156 (1970)) (citations omitted). I therefore conclude that the statute of limitations governing a civil RICO claim begins to run when the plaintiff knows or has reason to know of the injury from the last predicate act on which he relies.[10]

The Timeliness of Bankers' RICO Claim

Turning now to the facts of this case, I must determine whether Bankers' RICO claim is timely under the above standards. Bankers maintains that its RICO claim is timely even when measured by a three-year statute of limitations. Bankers reasons that the timeliness of its claims must be measured from the last predicate act, which it claims is the 1982 bankruptcy fraud.

Not surprisingly, Soifer contends that Bankers' claim against him is time-barred under a three-year statute of limitations. He maintains that the last predicate act with which he is charged is the concealment of the Brookfield asset in connection with the initial bankruptcy fraud. He asserts that this act was committed no later than March 1976, and that Bankers learned of the resulting injury no later than September 1976, when it commenced a proceeding in the bankruptcy court to set aside the confirmation of BAC's plan.

I agree that Bankers' claim against Soifer is time-barred to the extent that it is based upon his having violated the substantive proscriptions of RICO; however, I conclude that Bankers' claim is timely to the extent that it is based upon Soifer's having conspired to violate RICO. Although, as Bankers points out, the 1982 bankruptcy fraud is the most recent predicate act alleged, as noted above, the complaint contains no allegation that Soifer played any role in that transaction. Nor is Soifer alleged to have played any part in the frivolous lawsuits or the bribery of Judge Ballenger.

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10 Of course, if the defendant can show at trial that the predicate acts alleged constituted more than one pattern, he will not be liable for the injuries from the predicate acts comprising those patterns that did not continue into the limitations period.

Thus, the 1976 bankruptcy frauds are the most recent predicate acts in which Soifer is alleged to have participated. The commission of predicate acts by other participants in the enterprise cannot save Bankers' claims against Soifer for *substantive* violations of RICO. Only Soifer's own acts can have that effect. I therefore conclude that as to Bankers' claim that Soifer violated the substantive provisions of RICO, the three-year statute of limitations began to run in September 1976, when Bankers discovered the first bankruptcy fraud and commenced a proceeding to set aside the confirmation of BAC's plan.[11] Since this action was commenced some six years later, those allegations are barred by the statute of limitations and must be dismissed as against Soifer. Bankers may replead its substantive RICO claim within thirty days if it can allege with greater specificity Soifer's role in the post-1976 predicate acts.

Although the fact that Soifer's co-defendants committed predicate acts within the limitations period does not render Bankers' substantive RICO claims timely as to Soifer, the same is not true with respect to Bankers' claim that Soifer conspired to violate RICO. In the case of a continuing civil conspiracy, each time a member of the conspiracy commits an overt act in furtherance of the conspiracy, a cause of action accrues to the plaintiff to recover the damages caused by that act, and as to those damages the statute of limitations runs from the commission of the act. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-39, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971)

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11 Bankers' reliance on 18 U.S.C. § 3284 (1982) does not save its civil RICO claim against Soifer. Section 3284 makes fraudulent concealment a continuing crime that is not deemed complete, and for which the limitations period does not begin to run, until the debtor either receives a final discharge or is denied a discharge. Section 3284 is a criminal tolling provision, and is inapplicable to civil claims. It acts only to toll the five-year criminal statute measuring the timeliness of a prosecution for the underlying predicate act. Thus, theoretically, Soifer can still be prosecuted for his part in the initial bankruptcy fraud.

However, § 3284 has no effect on the running of the statute of limitations for a civil RICO claim alleging fraudulent concealment as a predicate act. Just as the fact that a predicate act is time-barred does not bar a civil RICO claim, so too the fact that a predicate act is not time-barred does not render a civil RICO claim timely.

(continuing antitrust conspiracy). Because Bankers has alleged that Soifer conspired with Braten and Rhoades to violate RICO, and that Braten and Rhoades committed predicate acts within the limitations period, Bankers' conspiracy claim is timely even as to Soifer. Of course, at trial Soifer may still attempt to prove that he withdrew from the conspiracy prior to the commission of the 1982 bankruptcy fraud, or that his co-conspirators' actions were either not in furtherance of or not a natural and probable consequence of the conspiracy. Accordingly, Soifer's motion for judgment on the pleadings is denied as to Bankers' claim that Soifer conspired to violate RICO.

The remaining defendants, other than Feldesman and Brookfield Clothes, *see supra* note 1, have also moved for judgment on the pleadings on statute of limitations grounds. There is no question that Bankers' claims against the remaining defendants were asserted timely, since each of these defendants is alleged to have played a part in the 1982 bankruptcy fraud, well within the three-year limitations period. Accordingly, their motions are denied.

Conclusion

For the foregoing reasons, I conclude that Bankers does not lack standing to assert its RICO claim. I also conclude that Bankers has adequately alleged the commission of a pattern of racketeering activity on the part of Soifer, Braten, and Rhoades, but not on the part of the various corporate defendants. Finally, I conclude that Bankers' claim that Soifer violated the substantive provisions of RICO is barred by the applicable statute of limitations, while its claim that Soifer conspired to violate RICO was brought timely. Bankers claim against Braten and Rhoades was also brought timely.

Accordingly, Braten and Rhoades' motion for judgment on the pleadings is denied in all respects. The corporate defendants' motion is granted and the complaint is dismissed as to Brookfield Industries, Inc., Bennington Court Ltd., Braxton Ltd., Aura by Laurie, Ltd., Erwin Commercial Corp., Michael B. Marks, Inc., Timely Textiles, Inc., and Todd Equipment Leasing Co., Inc. Bankers may replead within thirty days if it

can allege with more specificity that any of the corporate defendants actively engaged in two or more predicate acts of racketeering activity. If Bankers chooses to replead, it should separately number and state its allegations as to each corporate defendant, rather than lumping them together and referring to them collectively as "the defendants." Soifer's motion is granted with respect to Bankers' claim that he violated the substantive provisions of RICO and denied in all other respects.

SO ORDERED.

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

Part I—Crimes

Chapter 96—Racketeer Influenced and Corrupt Organizations

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information) section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 relating to interstate transportation of stolen motor vehicles), sections

2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of

gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged

in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(a)(1) any interest the person has acquired or maintained in violation of section 1962;

(a)(2) any—

(a)(2)(A) interest in;

(a)(2)(B) security of;

(a)(2)(C) claim against; or

(a)(2)(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(a)(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(b)(1) real property, including things growing on, affixed to, and found in land; and

(b)(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without

cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(d)(1)(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(d)(1)(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(d)(1)(B)(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(d)(1)(B)(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(d)(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfei-

ture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(d)(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible

to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(g)(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(g)(2) compromise claims arising under this section;

(g)(3) award compensation to persons providing information resulting in a forfeiture under this section;

(g)(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(g)(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(h)(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(h)(2) granting petitions for remission or mitigation of forfeiture;

(h)(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(h)(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(h)(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition, and

(h)(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

(i)(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(i)(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(l)(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(l)(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right,

title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(l)(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(l)(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(l)(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(l)(6)(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(l)(6)(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

(l)(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to

property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee. (n)[1] If any of the property described in subsection (a), as a result of any act of omission of the defendant—

(n)(1) cannot be located upon the exercise of due diligence;

(n)(2) has been transferred or sold to, or deposited with, a third party;

(n)(3) has been placed beyond the jurisdiction of the court;

(n)(4) has been substantially diminished in value; or

(n)(5) has been commingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover

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1 So in original.

threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.